Supreme Court, U.S.
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In The
Supreme Court of the United States

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William D.Kline.,

Petitioner,

versus

Dow Jones & Company
The Wall Street Journal
Dow Jones News Service
Barrons'
Manuel P.Asensio & Co.Inc
Manuel P. Asensio
PRnewswire Inc.

Respondents

*

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

*

Petition For Writ Of Certiorari

*

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89 pp

Questions Presented for Review

Question # 1: Does the 1st Amendment give to "any person ", including the defendants in this case ,the right to minipulate the price of a publicly traded company's stock price by dissemminating to investors , false and misleading material statements ,that they fabricated , knowing that these false and misleading statements will adversely affect the price of that stock ?

Question # 2 : Has a fundamental ,constitutional guarantee that all legal proceedings will be fair , been denied to Kline , when the lower Courts completly ignored all of Kline's arguments and supporting law as if he never made any and ignored the Federal Rules of Civil Procedure 12 , 12(b)(6) , 12(b)(7) and Rule 41(b) ?

Question # 3 : If a Supreme Court decision is still valid law did the lower Courts deny Kline his Constitutional right to equal protection of the laws when they dismissed the Kline 2 complaint using the Res judicata Bar , even though there was no right between the parties adjudicated or released in the order dismissing the Kline1 complaint , as the Supreme Court in their Costello Rule says must appear affirmatively in the decision order ?

Question # 4 : Was there reversible errors when the lower Courts allowed the defendants to use affirmative defenses ,the res judicata bar, in a F.R.Civ.P Rule 12(b)(6) motion , when there was nothing within the four corners of the complaint to support these defenses and this fact was pointed out to the Court by Kline ?

Question # 5 Was there reversable error when the lower Courts, on a F.R,of Civ.P Rule 12(b)6 motion to dismiss , allowed matters outside the pleadings to be presented to and not excluded by the court , the court in violation of F.R. of Civ. P. rule 12(b)(7) failed to convert the motion to one for summary judgment ?

Question # 6 : If other Circuits have allowed plaintiffs to

sue the same type of defendants , under the same Federal Statute for the very same conduct , even the very same defendants in two of the cases , and this fact was pointed out to the lower Courts with citations of the cases , shouldn't Kline have equal protection of the same federal statutory law as the plaintiffs in the other cases , which is guaranteed by the Constitution ?

William D. Kline v. Dow Jones & Co. et al

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Manuel P.Asensio
PRnewswire Inc.
Stephen Agus , Esq
Stuart D. Karle , Esq.
The Wall Street Journal
William D. Kline

Insurers :
Chubb Group of Insurance Companies
Media / Professional Insurance
National Casualty Company

Dow Jones & Co. Directors :

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June 23, 2000

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Petition for Writ of Certiorari

Petitioner ,William D.Kline , respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit , No.99-11594-JJ ,entered on Jan .
12 , 2000.

*

Decisions Below

The decision of the United States Court of Appeals , Eleventh Circuit is reprinted herein .(App . 1 thru 4.) The petition for a Rehearing and suggestion for en banc was denied April 21 ,2000 and is reprinted herein .(App. 5).The following unreported rulings of the district court are reprinted herein : The judgment order dismissing Kline 2 Complaint , issued May 19 , 2000 (App. 6 thru 8 .) The June 2 ,1999 Order denying Kline 2 petition for reconsideration of the May 19, 2000 dismissal order is reprinted herein (App. 9 thru 10 .) Judgment order dismissing Kline 1 Complaint ,issued April 21,1998 .(App. 11 thru 16 .) The Kline 1 petition for Reconsideration and motion to amend Complaint was denied June 15,1998 .Order reprinted herein (App. 17 thru 22 .)

*

Jurisdiction

This petition seeks review of a judgment of the United States Court of Appeal ,Eleventh Circuit ,entered Jan.12,2000 .After it's entry ,petitioner applied for rehearing and / or a rehearing en banc.On April 21,2000 , the court of appeal denied the application for rehearing with no member of the panel or judge in regular active service on the court requesting that the court be polled on hearing en banc. This Court's jurisdiction is invoked pursuant to 28 U.S.C. statute 1254(1)

*

Constitutional Provisions And Statutes Involved

The 1st Amendment provides :

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the **freedom of speech, or of the press**; or the right of the people peaceably to assemble, and to **petition the government for a redress of grievances.**

The 5th Amendment provides :

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation.

The 7th Amendment provides :

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

[Ga.Code Ann. § 105-302 (Rev.1968) provides that]

Wilful misrepresentation of a material fact, made to induce another to act, and upon which he does act to his injury, will give a right of action. Mere concealment of such

a fact, unless done in such a manner as to deceive and mislead, will not support an action. In all cases of deceit, knowledge of the falsehood constitutes an essential element. A fraudulent or reckless representation of facts as true, which the party may not know to be false, if intended to deceive, is equivalent to knowledge of the falsehood.

The Securities Exchange Act 1934, Statute 78j(b) and the Rule 10(b)-5 provides that :

[Persons liable; suits at law or in equity :]

Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to **any person** who shall purchase or sell any security at **a price which was affected** by such act or transaction,and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction .

Security Exchange Act 1934 Statute 78j(b), (10-b) Statute 10 (b) :

It shall be unlawful for **any person**,directly or indirectly,by the use of any means or instrumentality of interstate commerce or of the mails,or of any facility of any national securities exchange..(b) to use or employ,in connection with the purchase or sale of any security resgistered on a national securities exchange or any security not so registered,any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10(b)-5,17 CFR 240.10(b)-5 (1976)

>Employment of manipulative and deceptive devices.
>It shall be unlawful for any person , directly or indirectly , by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of national

securities exchange

(a) to employ any device , scheme or artifice to defraud .

(b)To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made , in light of the circumstances under which they were made ,not misleading ,or

(c) to engage in any act , practice , or course of business which operates or would operate as a fraud or deceit upon a person , >in connection with the purchase or sale of any security .

*

A Concise Statement of the Case :

[1] Course of Proceedings and Disposition in Court Below .

Petitioner brought this action under the Securities and Exchange Act ,1934,Statute 78j(b) and it's Rule 10(b)(5). Also under the Ga.Code Ann. § 105-302 (Rev.1968) .

The district court dismissed the Kline 2 complaint for failure to state a claim and the res judicata bar .

Kline filed this second complaint because there was no decision on a right between the parties in the Kline 1dismissal order.The district court has never said that the defendants were beyond the securities laws .

The district court didn't discuss the contents of the Kline 2 complaint or what issues that were decided in the Kline 1 complaint.

Kline petitioned the court to reconsider it's dismissal order and to revisit his complaint and arguments .All of his arguments and supreme court cites that backed them up were completely ignored . The court denied the motion to reconsider .

Kline immediately filed a notice of appeal .

The United States Court of Appeals for the Eleventh

Circuit affirmed the district court's dismissal order and made no comment on Kline's arguments and supreme court decisions regarding them res judicata bar and F.R.Civ.P. Rules 12 , 12(b)(6) and 12(b)(7). Petitioners timely petition for rehearing was subsequently denied on April 21,2000.

*

Statement of Facts Relating to Case :

The petitioner (Kline) is a seventy year old individual investor who has been active in the Securities Markets for over thirty years .He had a large stock position in Solv-Ex Corp.Solv-Ex was a research and development corp. Their market capitalization was $ 800,000,000 .They had a 55,000 acre concession of rich oil sands in Alberta Canada . In 1996 , Solv-ex started construction of a 15,000 barrel a day plant for extraction of the oil from the sands .

Solv-ex Corp. had their headquarters and a pilot plant in New Mexico . They had hauled 900 truck loads of oil sands from their concession in Canada to New Mexico , to perfect their technology for extracting oil from the sands .The C.E.O. of Solv-Ex had managed a oil extracting plant in Canada , he was a chemical engineer , and he had spent the past sixteen years trying to perfect a economical way to extract oil from the sands without polluting the environment.

Solv-Ex needed about $ 130,000,000 to construct the plant in Alberta ,Canada .They had raised nearly $ 100,000,000 from investors, including another company that Kline has a stake in , United Tri-Star , which invested $10,000,000 for a 10% stake .Solv-Ex had only a 5,500 acre oil sands concession before United Tri-Star entered the picture.Solv-Ex invested nearly $ 100,000,000 in the plant but because of the respondents constant barrage of false and misleading statements which were disseminated all over the world , big investors shied away and Solv-Ex went into debt . The " short-sellers " would be ruined if Solv-Ex was to complete the plant and their technology proved successful .

The " short sellers " , at any given time , had about 4,000,000 shares of Solv-Ex Corp. shorted . Solv-Ex had such a strong stock, that no matter what the " short sellers "did or said ,within days the price would rise again . The " short sellers " used Dan Dorfman of CNBC TV to undermine Solv-Ex's stock price until he stopped appearing on CNBC . According to the Wall Street Journal , the S.E.C. called him in for a interview . About this time the " Short -Sellers " were in big trouble and desperate .

The Dow Jones Companies had published articles about Solv-Ex in a fair and objective manner until March 22 ,1996 . On that date, they fabricated the story about " **Federal Criminal Authorities Investigating Solv-Ex and two International Stock Swindlers** " .This one story caused Solv-Ex 's stock to lose 67% of it's value . The short sellers didn't have any more worries now . That story and derivatives of it were disseminated frequently along with other fabricated stories until Solv-Ex sought bankruptcy .

On Jan.6 , 1997 , about ten months after the " **Federal Criminal Investigation of Solv-Ex and the Two International Stock Swindlers** " thing in The Wall Street Journal , **Barron's ,** on the **eve** of Solv-Ex's last IPO and last chance for the sale of some Reg S convertable debentures , came our with a story about unscrupulous off shore dealers selling Reg S securities to unsuspecting investors and how the Reg S securities eventually would delute the number of shares in a float but convertable debentures could do massive damage . The full paragraph about Solv-Ex was right in the thickest part of the story. It ruined Solv-Ex's offering .

The respondents disseminated sixty seven articles the first five months of 1997 , the biggest barrage was in May , 1997 .The respondents were able to drive away investors until the daily volume of shares traded went to nothing and Solv-Ex Corporation was never able to raise any additional money and had to take bankruptcy .

In the Kline 2 complaint , to satisfy F.R.Civ.P.Rule 9(b) , the Respondents ' statements were down loaded from the

internet like the original and attached to the complaint [like the first paragraph of a column on the front page of a newspaper .] Solv-Ex's stock price movements for that date were attached to each . The reason why Kline thought the statements were misleading was also attached to each article.The attachment was headed " Asensio Particulars " and " Dow Jones Particulars "

Kline pointed out , in his complaint and in his briefs , that he was claiming that all three subsections of the Statute 78j(b) Rule 10b-5 [(a), (b) , (c)] were violated by the respondents and caused damage to Kline [" in connection with "] his sales of Solv-Ex's stock [directly or indirectly] .

Facts About The Respondents :

Manuel P.Asensio & PRnewswire

The respondents , Manuel P.Asensio and PRnewswire have a unique relationship .Asensio is a member of PRnewswire and their editors are suppose to read what they put on the wire and edit whats improper. Asensio owns the Manuel P.Asensio Inc. brokerage business and is a big time " Short -Seller ". Asensio will pick a stock (usually of a small company in research and development like a Bio-Tech Co. or one like Solv-Ex , that is trying to go from research and development to production of a product) .He will short sell this stock in large number blocks of shares .

He then sits down with his computer and lets his imagination run wild with any thing he can conjure up that might spook an investor in that stock .Usually he slanders officers of the target company. He tells investors that they are being swindled , that the company is a fraud , that there is a scam being perpetuated on them . Some times he contacts the S.E.C. or Justice Department for some reason or other and lets his readers know that the S.E.C. is snooping into trading in their stock . Anything that will make an investor unload his stocks in a hurry .

He then gets PRnewswire to disseminate the misleading statements about his targeted short to PRnewswire's

customers . The editor of PRnewswire knows for a fact that Asensio is a " short seller ". This editor knows Asensio is making millions off these reports and this editor knows that **without him** there would be no fraud .So it is hard to believe that he doesn't get rewarded .This Editor has to read Asensio's so called report (they read like a slander sheet) and considering the source , he should refuse to disseminate it to PRnewswire's customers because with todays technology he can verify within minuets the reports contents . If he or Asensio can not verify , more the reason to refuse to put them on the wire .

Asensio's scheme is a sure way to make $ millions .He informs his readers about all the law suits he has . He says the 1st Amendment allows him to do and say what he wants to .He braggs about the courts dropping the securities fraud charges **because** the judge said " **if he allowed that theory of fraud to prevail his court would be flooded with litigation ".** The companies whose stocks' price are being minipulated will sue Asensio for securities fraud but the courts only let the defamation claims to have standing to maintain .That law suit doesn't help the investors . These suits just don't seem to bother him .There are no " class action cases " that could really put a hurting on him .

The Dow Jones & Companies :

The respondents, [Dow Jones & Companies] , have more influence on the movements of the price of securities than all the rest of the publishers of financial news events in the world .Peter R.Kann , publisher of The Wall Street Journal , in his annual letter to Readers wrote the following :

> " News is a unique ,and uniquely important **product .** But presented **dishonestly , unfairly or irresponsibly** , news can erode the public trust on which the news media's own success depends and , worse , corrode democratic systems of which it is so indispensably a part .In any case, the **impact** of the work of those of us in the news business-especially the work of those of us in the business news business - **On the work and lives of others** , places

special responsibilities on our shoulders .

Our Code notes that " it is an essential prerequisite for success in the news information business that **our customers believe us to be telling them the truth .**" The Code goes on to say that we will prosper only if our **customers can assume** that

(1) [our facts are **accurate** and **fairly presented**] ;
(2) [our analysess represent our best independent judgments rather than our **preferences , or those of our sources ,advertisers or information providers .**]
(3)[there are **no hidden agendas** in any of our journalistic undertakings .]

If the Editors of the Dow Jones Companies were to adhere to that " Code ", no one would ever have a reason to sue them .

The respondents ,over a period of time approaching **two** years, used their position in the securities business to influence individual investors like the petitioner to sell Solv-Ex Corporation's stock or to avoid the stock like it had the plague .This was **not done** by reporting negative news events, this **was done** by fabricating false and misleading statements that had no basis of fact . Being the dominant disseminators of financial news events , the Editors made sure that not a **single** news event that would have a positive effect on Solv-Ex's stock price , would reach investors thru the Dow Jones Companies from March 22, 1996 to the present date .That is a fact .

It is no coincident that whereever any news event about Solv-Ex originated or what Dow Jones Editor was involved , what ended up on the wire seemed to come from editors with the same mind set .

Dow Jones Interactive news (www.wsj.com) maintains a publication library .Kline found and made copies of the index for Solv-Ex Corp .There **were 147 negative** articles in there , including the doctored " Koch Industries press release ". Not a single one would cause the price of Solv-Ex's stock to go up As soon as this law suit started , Dow Jones cleaned out that

archive and replaced their negative articles with others , some by Asensio .That is a fact .

Business Wire was paid by Solv-Ex to disseminate their press releases .Business Wire used the very same words , comas ,periods,and etc; that Solv-Ex had dictated and got Solv-Ex's message out to a small number of investors thru their customers .

Dow Jones Newswire **was not** paid by Solv-Ex to disseminate their press release but **without pay** the Editors of Dow Jones took all of Solv-Ex's press releases and used **" Solv-Ex says "** and moved words, comas , periods and etc. so as to give a different message and salted the releases with their dated , negative , misleading statements . The investors didn't get Solv-Ex's message but they got the Dow Jones message and reacted accordingly .The Editors would use Solv-Ex's press releases as an excuse so they could put more downward pressure on Solv-Ex's stock price . This was an integral part of their scheme to minipulate Solv-Ex's stock price .This fact is well documented .They were very sucessful in this endeavor .

They would disseminate these same dated, negative statements whenever Solv-Ex's stock price showed strength .It is one thing for investors to discount the price of a stock because of bad news about a company but not for each new batch of investors to be faced with the same dated , fabricated, negative statements over and over for two years .Each new batch of investors when faced with these false and misleading statements bailed out of Solv-Ex's stock . How many times should the market have to discount the price of a stock for any given news event ? A trier of fact could possibly decide that this is manipulating a stock's price .

Solv-Ex was about to exit bankruptcy when word started circulating that Koch Industries was going to purchase a large position in Solv-Ex's project in Alberta ,Canada.The stock's price was less than a dollar . This is what Kline and other investors were hoping for before Solv-Ex sought protection in bankruptcy .Kline made a large investment in Solv-Ex's stock. A day after Kline made his last purchase of stock , Koch

Industries issued a press release in Canada , using Business Wire , confirming the rumor . Solv-ex's stock price shot up to $ 4.50 . Kline had a huge profit for a day .

The next day Dow Jones Newswire picked up the Koch Industries' press release and the editors did the same thing to it as they had been doing to Solv-Ex's press releases .They salted it with thesame dated , negative statements that they had been using for nearly two years.Solv-Ex's stock price nose dived to $ .06 . It is a fact ,that all of the short sale positions **were not** closed at this time .Some short sellers were more than likely expecting Solv-Ex to become **defunct** so they would never have to settle their short positions .

Kline decided that something had to be done about this . The Justice Department wants no part of it , the S.E.C. wants no part of it and Nasdaq wants no part of it . The only thing left is for Individual Investors to take their grievance to the Courts for relief but the Courts want no part of it .

Kline contacted a lot of lawyers and asked a simple question , [" can an individual investor sue a publisher of financial news if they fabricate and disseminate to investors , false and /or misleading statements that cause them to sell their stock at artificially depressed prices ?] Kline spent close to $10,000 trying to get lawyer's opinions on the Statute 78j(b) and it's Rule 10(b) .They had no trouble sending me a bill but they had trouble finding time to study the statute 78j(b) and the Rule 10b-5.They couldn't or wouldn't form an opinion like I paid them to do .All they did was talk in circles like lawyers do without really saying anything concrete and sounded like they had only glanced at the statute and the rule 10b-5.It was really beyond their expertise , they said , but they took my money .

The petitioner has , for over two years , been trying to do something about what the respondents' actions did to him . He has yet to get his day in court . The lower courts are saying he has had his day in court .The only thing Kline has been able to accomplish so far is file two complaints in the clerks office No one at the court has commented on anything he has written in his complaint or briefs but the court orders are a **mirror** of the defendants briefs .No issues between the

petitioner and the respondents have been discussed or settled because the lower courts have never allowed Kline the opportunity to maintain his case . The District Court 's dismissal order was only two pages , without any analysis at all on the Kline 2 Complaint and only a half hearted effort to explain the Res Juducata bar part .There was nothing fair about that .

*

Reasons for Granting the Writ

[1] The Circuit Court of Appeals decided that a plaintiff like Kline has no standing to sue persons like the defendants when they upheld the District Courts decision not to give Kline standing . This is an important question of Federal Law , that has not been ,but should be ,settled by this Court .

[2] The United States Court of Appeals has entered a decision in conflict with this Court's decisions on the Res juducata bar .The Circuit Court upheld the District Courts decision to ignore F.R.Civ.P. 12 and allowed the defendants use of **Affirmative Defenses** in a Rule 12(b)(6) motion to dismiss . Also the Circuit Court of Appeals upheld the District Court's decision to ignore the F.R.Civ.P. 12(b)(7) concerning matters outside of the four corners of the complaint and allowed the Court Order dismissing the Kline 1 complaint to be accepted without converting the motion to a summary judgment motion . The Kline 1 dismissal order was entered but there was no way for either of the lower courts to be able to point to where a decision on a right between the parties appeared **Affirmatively .**

In the Kline 2 dismissal order , the district court in it's analysis tried to satisfy the elements of a res judicata bar but stopped short after discussing only two elements because he couldn't find where a decision on a right between the parties had been adjudcated in the Kline 1dismissal order .So he then commented , "were res judicata not applicable here , nevertheless the court would reach the same result because

Kline's second complaint , like his first , fails to state a claim ." He never discussed a single sentence from the second complaint . That Court Order is in the Appendix for this Court's viewing . The Court order dismissing the Kline 1 complaint is also in the Appendix .

The following cites are found in just about every 11th Circuit decision that touches on res judicata , or 12(b)(6) motion where matters out side the complaint has been considered , *12/16/82 John CONCORDIA, v. J. Thomas BENDEKOVIC, Jr., Quarles v. Sager, 687 F.2d 344 (11th Cir.1982)*

Davis v. Howard, 561 F.2d 565, 571 (5th Cir.1977).

The court also said in Davis: "While we can allow departure from literal compliance with Rule 56(e), in [certain situations].We hold compliance as mandatory for a Rule 12(b)(6) disposition. ."(emphasis added). Id. at 571, citing among other cases, *Murphy v. Inexco Oil Co., 611 F.2d 570 (5th Cir.1980),* which in turn cited *Arrington v. City of Fairfield, 414 F.2d 687 (5th Cir.1969).* Thus, the judgment must be reversed because improvidently entered by the trial court.

See *Murphy, 611 F.2d at 573; Fed. R. Civ. P.12(b); 5 C. Wright, A. Miller, & E.Cooper,Federal Practice & Procedure § 1366 (1975).*Were the district court to fail to convert the Rule 12(b)(6) motion into a motion for summary judgment,**any determination made by the district court pursuant to Rule 12(b)(6) could not stand.**See *Murphy 611 F.2d at 573; see also Johnsrud, 620 F.2d at 33.* Under the **mandatory phrasing** of Rule 12(b), 12(b)(7), the court's failure to provide **a fair** procedure for submission of affidavits or other factual material is **reversible error .** The Court of Appeals for the Fifth Circuit has held compliance with the 10 day notice to be **mandatory** for a **Rule 12(b)(6)** disposition. That Court, by whose opinions prior to October 1, 1981 we are bound, said:

" Today we hold that where **matters outside** the pleadings are considered in disposition of a **Rule 12(b)(6) motion**, so as to **automatically** convert it to one for summary judgment pursuant to Rule 56, or as **one made sua sponte**, the Rule 56 stricture of notice, hearing and admissibility into evidence are **strictly** required. . . .

The Court of Appeals sanctioned the departure from this Rule by the trial Court and by so doing they are sanctioning the District Court's refusal to give Kline due process of law .

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Facts supporting questions # 2, # 3, #4, # 5, :

The District Court has issued a dismissal order based on the Res judicata Bar in direct contradiction of this Courts previous rulings on that subject . The District Court **erred** when it refused to abide by the F.R.Civ.P 12(b)(6) and rule 12(b)(7)when it allowed the defendants to use the affirmative defense of res judicata when the face of the complaint didn't support the defense .

The fact that matters outside the four corners of the complaint were presented to and not excluded by the court and the court did not convert the defendants motion to a summary judgment motion, which is mandatory by F.R.Civ.P.12(b)(7) and is **reversible error** by the 11th circuits own rules as well as in contradiction with this courts rulings .

The District Court's dismissal order was also based on failure to state a claim .The court in all fairness should , based on the Haines Rule , point out to the plaintiff any deficiencies in his complaint , and allow him to correct the deficiencies . If the law says that Kline has the right to sue the defendants then the Court ought to view the allegations in the Kline 2 complaint **as true** . See footnote [1] in order dismissing the Kline 2 Complaint (" In that all of Kline's claims are baseless

") . Also see ("This Court applies the dismissal standards set foth in *Davis v.Monroe County Bd.of Educ.* , *120 F .3d 1390 , 1393 (11th cir. 1997) (en banc) and Crayton v. Callahan , 120 F.3d 1217,1220 (11th Cir. 1997)* . **On a Rule 12(b) (6)** challenge , the court " **must accept** the plaintiff's factual allegations **as true** , drawing all reasonable inferences in plaintiff 's favor ."*2 Moores 's Prac . S.12.34 [1] [b] (3d ed.)* (footnote omitted)

In Kline's motion to reconsider , he asked the Court what was deficient about his complaint and didn't Kline have Constitutional rights under the 1st and 5th Amendments .In the Court's denial order, the Court didn't address the reason why Kline's complaint was deficient **unless** he did so when he said (" **pro se status** does not absolve litigant of duty to comply with fundamental procedural rules.")

Before I appealed to the Circuit Ct.of Appeals , I went over everything I had filed with the Kline 2 complaint and the motion to reconsider several times . I compared the Kline 2 complaint with federal securities fraud 78(j) and Rule 10(b)-5 complaints that had been filed by the biggest plaintiff's law firms who dominate in the number of security fraud claims filed in federal court .My complaint was equal to or better than the others when it came to alleging the elements of a fraud claim . The Rule 9(b) was satisfied many times over the other law firms . The only real difference between our complaints was **who the plaintiff was and who the defendants are .**

On my Constitutional rights question , the court addresses the fact that Kline is **pro se** and " plaintiffs like him are constitutionally guaranteed acess to the Courts ." However " once a **pro se** ... litigant is in court he is subject to the relevant law and rules of the court ."

No one has pointed out any rules that I didn't abided by or any laws that I didn't adhere to . Kline has tried very hard to learn some law and follow the F.R.Civ.P .He has pointed out to the District court and the Court of Appeals the fact that **all three** of the defendants did not adhere to F.R.Civ.P 12 ,

12(b)(6) when they did not respond with responsive pleadings ,where they could have used affirmative defenses. Instead they chose to make a motion pursuant to F.R.R.Civ.P 12(b)(6) to dismiss and ignored the provisions of that rule by using the affirmative defense of Res judicata bar .

The **district court erred** when it acepted the affirmative defenses,
when that defense was not supported within the four corners of the complaint .It **also erred** by accepting matter out side of the complaint and didn't convert the defendants 12(b)(6) motion for dismissal into a motion for Summary Judgment as the F.R.Civ.P.12(b)(7) stipulates .

The **District Court erred** when they accepted the rules presented by the defense governing Res judicata bar.These rules were made for a judgment made by a jury or a summary judgment order **where a decision on a right between the parties** had been adjudicated . The court did not make a decision on a right between the parties in it's dismissal order for Kline 1 complaint . None of the defendants , only Kline , made an argument for dismissing res judicata on a 12(b)(6) dismissal order. The district court ignored
Kline's argument and his cite below :

> In *Haldeman v. United States 91 U.S.584 and Costello v. I.N.S 365 U.S.265* , the Court said " there must be at least **one decision on a right** between the parties **before** there can be said to be a termination of the controversy , and **before** a judgment can avail as a bar to a subsequent suit suit....There must have been a right adjudicated or released in the first suit to make it a bar , **and this fact must appear affirmatively . "**

In *Costello,* the Supreme Court considered the res judicata effect of a judgment based on the failure of the government to file a statutorily required affidavit of good cause.

Rule 41(b),Fed.R.Civ.P.,which governs the effect of

dismissals, provides that a judgment of no jurisdiction is an **exception** to the general rule that a dismissal operates as an adjudication on the merits. Although prior cases had held that the failure to file the required affidavit was not a jurisdictional flaw in the sense of rendering the judgment vulnerable to collateral attack, the Court held that the requirement **was jurisdictional** for purposes of rule 41(b).

One defendant presented an uncertified copy of the Kline 1court order dismissing the complaint but he did not include the courts discussions . He pointed out the fact that certain technical elements of the Kline 2 complaint were different from the Kline 1 complaint , which were mentioned in the Court's Kline 1 dismissal order's discussions. He did not point out any decision on a right between the parties .

The other defendants just asked the Judge to check his records .The circuit court implied in their order affirming the lower court order that the district court Judge sua sponte accessed the Kline 1 court order.Even so , matters out side the pleadings were considered and the District Court did not convert the 12(b)(6) motion to a Summary Judgment motion or did the District Court show that **a right** was adjudicated or released in the first suit and that it appeared **affirmatively** .The burden was upon the defendants to prove affirmatively that this fact is in the Court Order . The burden was not upon Kline to prove a negative .

Also the rule the circuit court used for the sua sponte action was not valid for a 12(b)(6) dismissal order .The Circuit court used (*Cash Inn of Dade County Inc, v.Metropolitan Dade County,938 F.2d 1239* **(reviewing local ordinance requiring pawn shop owners to close at 5: 00 p.m.) (** *"A district court may take judicial notice of public records within it's files relating to particular case before it or other related cases ")* The Court Of Appeals' decision is unsupported by the case relied upon .

The Circuit court's rule came out of the same case that this rule came out of .(*Cash Inn of Dade County Inc,v.Metropolitan Dade County ,938 F.2d 1239,1242)(Summary judgment may be based on any evidence which*

would be admissible at trial .)This "Cash Inn" case was involved in a summary judgment where matters outside the pleadings are permitted .Even so, the *Costello Rule*, required the defendants and the court to show that a decision on a right between the parties was **shown affirmatively** in the Court order dismissing the Kline 1 complaint .The Defendants or the Court did not do this because they couldn't .

The above facts support Kline's contention that his hearing was not fair . His arguments and supporting cites were completely ignored by the lower Courts . The defendants gave no argument or suporting cites to support their motion for a res judicata bar on a Rule 12(b)(6) dismissal order and no argument or supporting cites why the complaint was deficient , they just named the elements and said the Kline 2 complaint didn't allege the elements .They never explained why they are the type of **entity** beyond the reach of the Federal Securities Laws . Kline made good arguments on the " in connection with " but his arguments were discounted as if he never made any .

In his petition for a rehearing ,Kline pointed out to the Courts the following :

> **[1]** Before an action may be summarily dismissed on the ground of res judicata the ends of justice require as a minimum that the defense of res judicata appear from the face of the complaint or that the **record** of the prior case be received in evidence. If matters outside the bounds of the complaint are considered by the district court, the merits of the claim must be tested by way of motion for summary judgment. See Fed. R. Civ. P. 12(b).In that event, even if a motion to dismiss pursuant to Rule 12(b)(6) has been properly interposed, the court **must convert** it into a summary judgment proceeding and afford the plaintiff a reasonable opportunity to present **all material made pertinent to a summary judgment motion by Rule 56.** See *Murphy, 611 F.2d at 573; Fed. R. Civ. P.12(b); 5 C. Wright, A. Miller, & E.Cooper, Federal Practice & Procedure § 1366 (1975).* Were the

district court to **fail to convert** the Rule 12(b)(6) motion into a motion for summary judgment, **any determination made by the district court pursuant toRule 12(b)(6) could not stand.**

*See Murphy, 611 F.2d at 573; see also Johnsrud, 620 F.2d at 33.*Under the **mandatory phrasing** of Rule 12(b),12(b)(7), the court's failure to provide **a fair** procedure for submission of affidavits or other factual material is **reversible error .**

After the Kline 1 complaint was dismissed , Kline filed a motion to amend the complaint .The District Court Denied this motion .

Nilsen v. City of Moss Point, 674 F.2d 379 (5th Cir. 04/26/1982)

Similarly, when the court in Nilsen II/III declined to exercise its discretion to permit the amendment of the complaint, fairness requires that Nilsen be given a opportunity to raise those claims in a second proceeding. **We held that the unfulfilled requirements in the first** action were jurisdictional in the res judicata sense, in that they were merely conditions to reaching the merits, and the plaintiff therefore was not barred.
See generally Dussuoy v. Gulf Coast Investment Corporation, 5 Cir. 1981, 660 F.2d 594, 600 n.3. We may disagree with the Nilsen II/III court on the question how much discretion a court has in denying leave to amend.The fact remains that here the system operated to allow the federal courts discretion under rule 15(a) to deny leave to amend.**When a system does not permit liberal amendment, it is inappropriate to give broad preclusive effect to the inadequacies of the original complaint.** *See generally Restatement (Second) of Judgments § 61, comment a at 142 (Tent. Draft No. 5,*

1978). Costello v. United States, 1961, 365 U.S. 265, 81 S. Ct. 534, 5 L. Ed. 2d 551,

"If the first suit was dismissed **for defect of pleadings**, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action,**the judgment rendered will prove no bar to another suit."** *See also House v. Mullen, 22 Wall. 42, 46; Swift v. McPherson, 232 U.S. 51, 56; St. Romes v. Levee Steam Cotton Press Co., 127 U.S. 614, 619; Burgett v. United States, 80 F.2d 151; Gardner v. United States, 71 F.2d 63.*

Facts supporting questions # 1 ,# 6 :

There is precedent for the Courts to allow investors **to sue persons <u>like</u> the defendants** .What the defendants are alleged to have done is of concern to investors .No investor wants to put a chill on the good work that the Dow Jones Companies are doing . What we want to put a chill to is the reckless disregard of the harm they are causing investors when they disseminate false and misleading material statements to the investing public about stocks they own .They only do this to small struggling companies that don't have the resources to fight them .They could care less about investors like me sueing them because they have so far been able to get the courts to drop the securities fraud charges because the courts seem afraid if they open the gates they will be flooded with litigation

The courts are probably right about being flooded with securities fraud litigation if they allow " bona fide "publishers of financial information like Dow Jones & Co.to be sued , <u>if</u> things are that bad .

It seems like the only way investors like Kline can protect themselves from persons like Manuel P.Asensio ,who claims on his web page that the 1st amendment allows him to say what he wants and he is going to do what he wants , or the

Dow Jones Editors who hatch schemes to manipulate particular stocks and show bias and do not report objectively or truthfully , is to use the Securities Laws which were made to insure honest and fair markets .If it does take a lot of litigation to stop what is going on in the securities markets by persons like the defendants and the authorities (none of them) will do anything about it , then it is better for litigation to happen then for the Courts to give the Respondents a license to defraud individual investors , like they are doing .

No one would go to the trouble to sue over a typographical error or even for something that was just negligence . When the Editors fabricate and disseminate the **same false** misinformation every time the price of a stock rises high enough for a short seller to make a fortune , for a period of more than two years , and never disseminate any statements that are positive , only negative ones , like they did in my case,then it really warrants a civil suit or **more.** Readers and Investors like Kline put their trust in Dow Jones to be objective and to report only the truth,the full truth .The "bona fide " financial information that they disseminate is welcomed by investors of all stripes but the false and/or misleading statements and dated negative news is welcomed by **only** " short sellers " and the **Editors** of the Dow Jones Companies are very much aware of this fact .

> Judge Waterman writing for the Court in *Texas Gulf Sulphur 401 F.2d 833 at 839 (2d cir . en banc 1968)* , construed the **" in connection with "** requirement and broadly held that the clause was satisfied whenever a device was employed "of a sort that would cause reasonable investors to rely thereon ,and ,in connection therewith ,so relying , cause them to purchase or sell a corporations's securities ", There is no necessity for contemporaneous trading in securities by insiders or by the corporation it self . " **Rule 10b-5 is violated whenever assertions are made** in a manner reasonably calculated to influnce the investing public** ,e.g. by means of the financial media **,if

such assertions are false or misleading or are so incomplete as to mislead , **irrespective** of whether the issuance of the release was motivated by corporate officials for ulterior purposes ." *S.E.C. V. Texas Gulf Sulphur at 861* .

Market manipulation charged under this section 10(b) and it's implementing Rule 10(b)-5 does not require an allegation of the defendants purpose to induce the sale of securities by others . *U.S. V. Charnay ,C.A. Nev. 1976 , 537 F. 2d 341, certiorari denied 97 S.Ct.527 ,528 , 429 U.S. 1000 , 50 L.Ed. 2d* .

There are controling authorities for this action bought under Section 10(b) and the Rule 10(b)-5 . The situation involved a financial columnist for Hearst Newspapers . He made misleading statements , and omitted material statements concerning a certain stock , that caused the stock's price to temporary raise in value. This action on his part caused the plaintiff in that case to suffer damages .

(a) Where Newspaper financial columnist violated this section by failing to reveal material information when he wrote column praising investments merits of corp. which was party to planned corp.merger.Stock holder of other party to such merger who suffered when column caused unwarranted temporary rise in price of shares to which it referred , thereby decreasing number of shares which they received in merger , occupied position similar to that of columnist's readers , Columnist action constituted breach of duty to such parties , and they were entitled to recover damages which they sustained as result . *Zweig V.Hearst.594 F.2d 1261 (1979)*
(b)His relationship to the public was not a fiduciary one under common law but that is not dispositive of the Rule 10b-5 claim . Compare *Santa Fe Industries v. Green , 430 U.S. 462 (1977)*(no Rule 10b-5 violation

despite alleged violation of state law fiduciary duties), with *Affiliated Ute Citizens of Utah V. United States* , (supra)(no ordinary state law duties , but Rule 10b-5 duty violated.) *Zweig V. The Hearst Corp. 594 F.2d 1261 (1979)*

Before *Zweig V. The Hearst Corp. 594 F.2d 1261 (1979)* ,there was *Reliance Ins.Co.v. Barron's (SDNY.1977) 442* The court let Reliance Ins. have standing . Barron's had disseminated a negative article on the eve of their I.P.O.They went to trial but Reliance couldn't prove scienter .

In 1980 , after Zweig v. Hearst , A dentist in New York , *Robert B.Nemeroff D.D.S. v. Dow Jones & Company ,Barron's and Alan Abelson , Robert Bleiberg , 620 F.2d 339 (2d cir . 1980)* . . The Dentist sued because Alan Abelson the columnist wrote a story about a stock the dentist owned .The dentist had standing to sue .Robert Nemeroff had a prestigious law firm out of Boston to represent him but this law firm didn't even conduct discovery so the case was dismissed for lack of prosecution after two years .

06/18/45 ASSOCIATED PRESS ET AL. v. UNITED STATES 1945.SCT.807 , 326 U.S. 1, 65 S. Ct. 1416, 89 L.Ed.2013 For equal -- **not unequal** --Justice under law is the goal of our society. Our legal system has not established different measures of proof for the trial of cases in which equally intelligent and responsible defendants are charged with violating the same statutes. Member publishers of AP are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want. *See International News Service v. Associated Press, 248 U.S. 215, 229, 230.* **All are alike** covered by the Sherman Act. The fact that the publisher handles news while others handle food does not,as we shall later point out, afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws

regulating his business practices.Freedom of expression, it would seem, is as precious as either due process or the equal protection of law.*Grosjean v. American Press Co., 297 U.S. 233; DeJonge v. Oregon, 299 U.S. 353*.The business of the Associated Press is not immune from regulation because it is an agency of the press. The **publisher of a newspaper** has no special immunity from the application of general laws. **He has no special privilege** to invade the rights and liberties of others.He must answer for libel.He may be punished for contempt of court. He is subject to the antitrust laws. Like others he must pay equitable and nondiscriminatory taxes on his business.The regulation here in question has no relation whatever to the **impartial** distribution of news.The order of the Board in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication, and the petitioner is free at any time to discharge Watson or any editorial employee who fails to comply with the policies it may adopt.*Alexander v.United States (1993) ,509 US 568* The liberty of the press is indeed essential to the nature of a free state.But this consist in laying no previous restraints upon publications ,and **not in freedom from censure for criminal matter when published.**But if he publishes what is improper mischievous ,or illegal ,he must take the consequemce.*Associated Press v.N.L.R.B. 301 US 132-133* Accordingly ,enforcement of such general laws against the press is not subject to stricter scruting than would be applied to enforcement against other persons or organizations. The equally well established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report news. *408 US 665 (1972) ,327 US 186 (1946) ,460 US 575 (1983)*

3 Loss , Securities Regulations 1445 (2 Ed.19861) observe that " Rule 10b-5 , like statute 17(a) of the Securities Act ,is not limited to coprporate insiders - however that term may be defined . The Rule may be invoked whenever **any person insider or outsider** indulges in fraudulent practices , misstatements or half - truths " in connection with " the purchase of securities ."

Conclusion :

[1] Substantive due process claims are of two types.The first type includes claims asserting **denial of a right**, privilege,or immunity secured by the Constitution or by **federal statute** other than procedural claims under "the Fourteenth Amendment simpliciter." *Parratt, 451 U.S. at 536* .We caution, therefore, that **attention be given** to Fed. R. Civ. P. **12(b)(6)** dismissals, **particularly when the defendants have not yet answered and asserted their affirmative defenses,** (Whether the stated claim can be proved conclusively is an issue for resolution by some process other than dismissal under Rule 12(b)(6).) Due process protects the right of every person to have his or her day in court and to have the **benefit of the law**.

[2] A fundamental, constitutional guarantee that all **legal proceedings** will be **fair** has been denied .The judgment violates due process of law, in its primary sense of an opportunity to be heard and to defend one's substantive right.Thus, by denying to Kline the only remedy ever available for the enforcement of his right to prevent the seizure of his property, the judgment deprives the plaintiff of his property.If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without him ever having had an opportunity to defend against the exaction .

The lower court refused to hear the plaintiff's complaint and denied it relief .If the result above stated were attained by an exercise of the State's legislative power, the transgression

of the due process clause of the Fourteenth Amendment would be obvious. *Ettor v. Tacoma, 228 U.S. 148.* The violation is none the less clear when that result is accomplished by the **federal judiciary** in the course of construing an otherwise valid **federal statute**. The federal guaranty of due process extends to federal action through its **judicial** as well as through its legislative, executive or administrative branch of government.

The statute 78j(b) and the Rule 10b-5 gives to Kline the Fundamental right to sue the defendants . This right should not be taken away without due process of law. This Court has said " The law says what it means and means what it says.") This law says Kline has the right to sue the defendants and there are **no qualifications** in the statute that says otherwise . The Courts have **not said** he dosen't have that right , they just will not let him exercise that right , by doing this they are denying Kline his due process of law .

Therefore, Kline respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,
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Ph.(912) 684-3081

June 23, 2000

William D. Kline
William D.Kline

Docket No._____

*

In The

Supreme Court of the United States

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William D.Kline

Petitioner

versus

Dow Jones & Company
The Wall Street Journal
Dow Jones News Service
Barrons'
Manuel P.Asensio & co. Inc
Manuel P.Asensio
PRnewswire Inc.

Respondents

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On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit

*

Petition for Writ of Certioari
Appendix

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Appendix Contents

Circuit Court of Appeals order affirming the District Court order of May 19,1999 , dismissing Kline 2 complaint was entered Jan.12,2000 .....App.1 - 3

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The District Court Order dismissing Kline 2 complaint was entered May 19,1999 .....App. 6 - 8

The District Court Order denying petition for rehearing of their dismissal order of May 19,1999 , was entered June 2,1999 .....App. 9 - 10

The District Court Order dismissing the Kline 1 complaint entered April 21,1998 .....App. 11 - 15

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-11594 Jan.12 ,2000
Non-Argument Calendar Thomas K.Kahn
Clerk

D.C.Docket No. 99-00071-6-CV-BAE

William D.Kline ,

Plaintiff-Appeallant,

versus

Dow Jones & Co.,Inc., Asensio & Co.,Inc.
PRnewswire ,Inc.,

Defendants-Appellees,

Barron's,Wall Street Journal ,
Dow Jones News Ser.,Manuel P.Asensio ,

Defendants.

Appeal from the United States District Court
For the Southern District of Georgia

January 12 , 2000
Before ANDERSON , Chief Judge , COX ,and DUBINA
Circuit Judges

Per CURIAN:

William D.Kline , a pro se litigant ,appeals the district court's dismissal of his securities fraud suit as barred by res judicata and , in the alternative ,for failure to state a claim . We affirm.

Discussion

The essence of Kline's grievance is that the various media entities he sues , manipulated the price of a stock in which he has an interest by publishing a series of false and misleading articles about the company.These articles ,he alleges ,violated the Securities Exchange Act of 1934 ,15 U.S.C. statut78j(b)," Rule 10b-5 ", 17 C.F.R. statute 240.10b-5 , and Georgia Common law .This court affirmed the district court's dismissal of an earlier version of this suit (alleging violations of Georgia rather than Federal Securities laws) under Fed.R. Civ.P. 12(b)(6) and for lack of personal jurisdiction over one of the defendants .*See Kline V. Dow Jones & Co.,* No. 98-8921 , unpublished (11th Cir. March 9,1999). Kline now reasserts the same basic facts ,this time in support of federal claims.He has removed from his sights the one defenfant dismissed for lack of personal jurisdiction , but he has sued a defendant not previously targeted , Manuel P.Asensio . The District Court dismissed Kline's second complaint in response to another round of Rule 12(b) motions on the ground that the suit is barred by res judicata ,and alternatively that Kline's complaint fails to state a claim .

Reviewing de nova the district court's order granting the 12(b)(6) motions , see Harper v.Thomas ,988 F.2d 101 (11th Cir.1993) ,we agree that Kline's suit is barred by res judicata .Kline has not alleged a new factual basis for his second suit ,and nothing prevented him from applying federal as well as state law to those " old " facts in his original complaint in the first suit .See *Pleming v. Universal -Rundle Corp;* 142 F.3d 1354, 1356-57 (11th Cir.1998)
AFFIRMED .

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1 Kline's argument that the district court should have

construed Dow Jones 's motion to dismiss as a motion for summary judgment because of the appended court documents , fails because the district court could in any event have considered those documents in order to dispose of the motion .*See Cash Inn of Dade Inc. v. Metropolitan Dade County ,938 F. 2d 1239 ,1243 , (11th Cir. 1991)(* " a district court may take judicial notice of public records within it's files relating to the particular case before it or other related cases ".)

In The United States Court of Appeals
For The Eleventh Circuit

*

No. 99-11594-JJ Apr.21,2000

*

-William D.Kline,

Plaintiff-Appellant

versus

Dow Jones & Co. ,
Asensio & Co. ,Inc.,
PRnewswire .,

Defendants-Appellees

*

On Appeal from the United States District Court for the Southern District of Georgia

*

On Petition (s) for Rehearing and Petition(s) for rehearing En Banc (Opinion January 12,2000,11th Circuit., 19__,F.2d__)

Before: Anderson,Chief Judge ,Cox,Dubina, Circuit Judges.

Per curiam:

The petition(s) for rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure ; Eleventh Circuit Rule 35-5), the petition(s) for Rehearing En Banc are DENIED .
Entered for the Court:

/ s / E.R.Cox
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRIC OF GEORGIA
STATESBORO DIVISION

William D.Kline ,

Plaintiff,

v.

Dow Jones and Company , Barrons , The Wall Street Journal ,Dow Jones News Service , Manuel P.Asensio , Asensio and Company Inc. and PRnewswire ,Inc.

CV 699-71

Defendants

*

ORDER

I. BACKGROUND

In 1998 *pro se* plaintiff William D. Kline sued several publishers of financial and business news , alleging violations of federal securities laws and other state fraud statutes . Finding no personal jurisdiction over one defendant , and that Kline had failed to state a claim as to the others , the Court dismissed Kline v. Dow Jones and Company , et al ., cv698-3 (S.D. Ga. order entered 4/21/98) (Kline 1) , aff'd , # # 29-30 (11th Cir. 3/9/99) .Kline has now sued again , essentially relaunching the same ship while rearranging it's deck chiars .1 Doc. # 1 . The defendants , however , have fired two torpedoes at it , insisting that the action is barred by res judicata and in any event Kline again has failed to state a claim .Doc. # # 3, 6, 10 .

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This time he has sued the same defendants plus Manuel P. Asensio , who owns previous and current defendant Asensio & Co. Inc. In that all of Kline's Claims are baseless , however

, this does not alter the Court's Analysis .

II. ANALYSIS

" In order to prevail on a claim of res judicata , the party asserting the bar must prove that (1) there was a prior judgment on the merits , (2) entered by a court of competent jurisdiction , (3) with substantial identity of the parties , (4) involving the same cause of action ." Southeast Florida Cable v. Martin County , ___ F.3d ___ , 1999 WL 246650 at * 2 (11th cir. 4/27/99).

In determining whether to apply res judicata , we " must look to the factual issues to be resolved [in the second cause of action],and compare them with the issues explored in the first cause of action ." Manning v. City of Auburn , 953 F.2d 1355 , 1359 (11th Cir. 1992) (Quoting S.E.L.Maduro V. M/V Antonio De Gastaneta , 833 F.2d 1477 , 1482 (11th Cir. 1987) (brackets in original) . If there has been " a [ ] ... modification of significant facts creating new legal; conditions , res judicata is no defense .' " " id . (quoting Jaffree V. Wallace , , 837 F 2d 1461 , 1469 (11th Cir. 1988) (brackets in original).id. at * 3; Ramirez V. Brooklyn Aids Task Force , 175 F.R.D. 423 , 426-27 (E.D.N.Y. 1997) (dismissal for failure to state a claim is deemed to be a judgment on the merits for res judicata purposes).

Here all but one of the instant parties were present in the first suit , see supra note 1 , and the current claims are not significantly different from those dismissed in Kline 1 . For that matter , res judicata bars not only the exact legal theory presented in the previous litigation , but also all legal theories arising out of the same operative nucleus of facts . Pleming V. Universal - Rundle Corp., 142 F. 3d 1354 , 1356-57 (11th Cir.1998) .

With respect to the same defendants on both actions , then , any legal claims that Kline could have raised in Kline 1 are barred now. see Migra v. Warren City Sch. Dist. Bd. of

Educ. ,465 U.S. 75 ,77 n. 1 , 84-85 (1984) . Nor does Kline present anything new with the " new " defendant (Manuel P. Asensio). In that respect , even were res judicata not applicable here , nevertheless the Court would reach the same result because Kline's second complaint , like his first , fails to state a claim .

III CONCLUSION

Accordingly , the defendants ' motions to dismiss (doc. # # 3 ,6 , 10) are **GRANTED** , and [plaintiff's complaint is **dismissed with prejudice .**

So Ordered , this 18th day of May ,1999 .

/ s / B.Avant Edenfield , Judge
UNITED STATES DISTRICT COURT
SOUTHERN DISTRIC OF GEORGIA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRIC OF GEORGIA
STATESBORO DIVISION

William D.Kline ,

Plaintiff,

v.

Dow Jones and Company , Barrons , The Wall Street Journal ,Dow Jones News Service , Manuel P.Asensio , Asensio and Company Inc. and PRnewswire ,Inc.

CV 699-71

Defendants

*

ORDER

Plaintiff ,William D.Kline , moves this court to reconsider it's 5/19/99 order dismissing his complaint on , inter alia , res judicata grounds . Doc.# 16. Kline seems to believe that pro se litigants deserve a second bite at the apple if they don't get it right the first time. Id. He therefore asks the court to reinstate his complaint and explain why he cannot sue the defendants under the securities laws . Id.

Plaintiffs like Kline are constitutionally guaranteed access to the courts , see Bill Johnson's Restaurants,Inc. v.NLRB. 461U.S. 731.741 (1983) , and are entitled to have their pleadings construed liberally . Sanders V. U.S.,113 F.3d 184,187 (11th cir. 1997) ; Whane v.State of Kan., 980 F.Supp.387, 393 (D.Kan.1997) .

However ,"once a pro se ...litigant is in court , he is subject to the same procedural and evidentiary rules that are applied to a represented party . see Brock v. Douglas Kohoutek , L.P. ,225 Ga. App.104 ,109 (1997) (" In a civil case the court cannot put a pro se litigant on a different standard from one represented by counsel " (internal quotes and cite omitted). Wakefield v. Railroad Retirement Bd. ,

131 F.3d 967 ,970 (11th cir. 1997) (fact that claimant was pro se litigant unfamiliar with the legal process did not warrant equitably tolling limitations period for petitioning for judicial review of Railroad Retirement Board's denial of benefits).

In other words " [c]ourts do and should show a lenience to pro se litigants not enjoyed by those with the benefit of a legal education Yet even in the case of pro se litigants this leniency does not give a court license to serve as de facto counsel for a party , or to rewrite an otherwise deficient pleading in order to sustain an action ...."
GJR Investments , Inc. v. County of Escambia ,Fla., 132 F.3d 1359 1369 (11 cir. 1998) (internal cites omitted) ;Lemons V. Lewis , 969 F. Supp. 657 , 659 (D.Kan . 1997)(pro se status does not absolve litigant of duty to comply with fundamental procedural rules ; nor is it " the court's function to become an advocate for the pro se litigant ").

Accordingly , plaintiff , William D. Kline's motion for reconsideration (doc.# 16) is **DENIED** .

So ordered , this 1st day of June ,1999 .

/ s / B.Avant Edenfield , Judge
United States District Court
Southern District of Georgia

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

William D.Kline , April 21 , 1998

Plaintiff,

v.

Dow Jones and Company , Barrons , The Wall Street Journal ,Dow Jones News Service , Manuel P.Asensio , Asensio and Company Inc. and PRnewswire ,Inc. **CV 698-003**

Defendants

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ORDER

Pro se plaintiff William D. Kline filed suit against several publishers of financial and business news alleging violations of the Georgia Securities Act of 1973 , the Georgia Fair Business Practices act of 1975 and possibly federal securities laws. Complaint II 2 , 10 . Plaintiff , who owns shares in Solv-Ex Corporation ("Solv-Ex ") , alleges that in 1997 the defendants manipulated the price of Solv-Ex stock by publishing false and misleading information about the company .Id. II 3-5 .In response ,the defendants have filled respective motions to dismiss . Doc. # #7 ,9 ,11 ,13 .

This Court applies the dismissal standards set foth in Davis v.Monroe Count Bd. of Educ. , 120 F .3d 1390 , 1393 (11th cir. 1997) (en banc) and Crayton v. Callahan , 120 F.3d 1217,1220(11th Cir. 1997) . On a Rule 12(b) (6) challenge , the court " must accept the plaintiff's factual allegations as true , drawing all reasonable inferences in plaintiff 's favor ."2 Moores 's Prac . S.12.34 [1] [b] (3d ed.) (footnote omitted)

Due to his *pro se* status , Kline's pleadings are entitled to some deference . That is ," [c] ourts do and should show a

lenience to *pro se* litigants not enjoyed by those with the benefit of a legal education [Cit .] Yet even in the case of *pro se* litigants this leniency does not give a court license to serve as de facto counsel for a party , [cit] ,or to rewrite an otherwise deficient pleading in order to sustain an action ...." GJR Investments , Inc. v. County of Escambia , Fla. , 132 F.3d 1359 , 1369 ,) (11 th Cir. 1998).

I . **ANALYSIS**

A . The Georgia Securities Act of 1973

Plaintiff first asserts claims pursuant to the Georgia Securities Act of 1973--- specifically O.C.G.A. Statute 10-5-14 (a) and statute 10-5-12 (a) (2) , which makes it unlawful for any person to employ a scheme to defraud , to make an untrue statement about or to omit a material fact ,or to engage in a course of business that operates as fraud " in connection with an offer to sell ,sale ,offer to purchase , or purchase of any security , directly or indirectly ." O.C.G.A. statute 10-5-12 (a) (2) .

Kline's complaint , however fails to allege that the defendants did anything " in connection with " the sale or purchase of any security .2 Instead , he simply contends that the defendants published several articles that " were untrue and/or contained half

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1 Section 10-5-14 (a) provides that any person who violates statute 10-5-12 is liable to the person buying such security .

2 O.C.G.A. STATUTE 10-5-2 (24) SPECIFICALLY DEFINES " Sale " , " Sell " , "Offer " to " sell , and " offer for sale ". truths , material omissions of fact and misleading information ."Complaint **I 4.** Accordingly ,he has failed to state a claim under the Georgia Securities Act .

As plaintiff's securities claims sound in fraud , he must plead the facts establishing such fraud with the particularity required by F.R.Civ.P. 9 (b) . Gross v. Medaphis Corp. ,977 F.Supp.1463 ,1470 (N.D.Ga. 1997). A complaint satisfies Rule 9 (b) when it sets forth (a) What statements or omissions

were made ; (b)The time ,place , and maker of such statement (c) the content of the statement and how it is misleading ; and (d) what the defendant obtained as a consequence of the fraud Brooks v. Blue Cross and Blue Shield of Florida , Inc.,116 F.3 1364 , 1371 (11th Cir.1997) .

Kline , however , has failed to plead any such facts with particularity . Instead , he simply provides a sample of headline and sentences from articles defendants allegedly published without indicating which defendant made the statements , whe and where they were made , or how they were misleading .Thu , plaintiff' security fraud claims must also be dismissed for lack of particularity .

B . The Georgia Fair Business Practices Act of 1975

Kline also advances claims under O.C.G.A.statute 10-1-393.5 (b)prohibits any person engaged in telemarketing , any activity involving or using a computer or computer network , c home repair from employing a scheme to defraud or course of business that operates as a fraud .Section 10-1-399 proviodes civil remedy for persons injured by a violation of " Chapter 5(t of this title " which concerns the " use of the telephone in a fraudulent or abusive manner as a means of solicitation ...." O.C.G.A. statute 10-5B-1.

Plaintiff has not alleged that any of the defendants were involved in fraudulent telemarketing or used a computer or telephone to defraud him . Furthermore , Georgia's Fair Business Practices Act (" FBPA ") does not even provide a cause of action for a securities fraud claim . See also Taylor v. Bear Stearns & Co., 572 F.Supp. 667 672-75 (N.D.Ga. 1983) FBPA does not apply to conduct regulated by an administrativ agency) (citing Ferguson v. United Ins. Co. of America , 163 Ga. App. 282 , 283 (1982) (insurance transactios are exemp from the FBPA because they are regulated by the Georgia Insurance Code)). Securities transactions are specifically regulated by the Georgia Securities Act of 1973 --- statute O.C.G.A. 10-5-1et seg . Furthmore ,they are also regulated extensively by federal law .See e.g., 15 U.S.C. statute 77a (

Securities Act of 1933) and 15 U.S.C. statute 78a (Securities Exchange Act 1934). Accordingly , the FBPA does not apply to securities tansactions and thus plaintiff cannot state a claim under it .

C. Federal Securities Laws :

The Complaint briefly references the Private Securities Litigation Reform Act of 1995 , complaint 1 10 , but Kline fail to show how it might apply to his case .3 Accordingly , any federal claim Kline is attempting to raise is also subject to dismissal .

D . Libel :

Defendants ' characterization of plaintiff's lawsuit as a " dressed up " libel suit is correct . Kline alleges that the defendants printed defamatory information about Solv-Ex , causing it's stock price to decline . This action sounds in libel not securities fraud as plaintiff asserts . See Reliance Ins. Co.Inc v. Barron's ,442 F.Supp. 1341 ,1353 (S.D.N.Y. 1977) (" securities laws ....were not developed with the intention of overlapping or reinforcing the law of libel , nor to inhibit the exercise of freedom of the press "). Kline ,however , cannot assert a libel claim because the alleged defamatory statements were not made about him . Cox Enterprises ,Inc.v.Bakin,206 Ga. App. 813 ,816 (1992) ; Fiske v. Stockton , 171 Ga . App.601 ,602 (1984).

E. Personal Jurisdiction

This court does not have personal jurisdiction over defendant United News & Media plc (" UN&M "). A court cannot exercise personal jurisdiction over a non-resident defendant unless plaintiff can establish that (a) the defendant has had " minimun contacts " with the forum state , and (b) such contacts are sufficient to satisfy the Due Process Clause of the Fourteenth Amendment so that " maintenance of the suit does not offend traditional notions of fair play and

substantial justice .'" International Shoe Co. v. Washington 326 U.S. 310 , 316 (1945) (cites omitted).

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3 A Complaint must contain factual assertions which , when mated with the legal grounds stated ,show that " the pleader is entitled to relief under the substantive law of the jurisdiction ." 5 Wright & Miller , Federal Prac. and proc. : Civil 2d Statute 1204 (1997 Supp .) ; see also Almand v. Dekalb County , Ga. ,103 F.3d 1510 ,1514 n.8 (11th Cir.) , Cert denied , 118 S.Ct. 411 (1997).

UN&M is an English corporation with it's sole office in London and whose corporate activities are limited to the United Kingdom . Siddel Aff . 1 2 . It is not rwegistered to do business in nor does it transact business in Georgia or anywhere else in the United States . Id. Accordingly , UN&M lacks the required minimun contacts with this forum for this court to assert personal jurisdiction over it , and thus due process requires the dismissal of plaintiff's complaint against UN&M on this ground .

II . CONCLUSION :

Accordingly , all defense motions to dismiss (Doc. # # 7 ,9 11 ,13) are **GRANTED** . Plaintiff 's Complaint against defendants Dow Jones and Company , Barrons , The Wall Street Journal , The Dow Jones Newswire , PRnewswire , and Asensio and Company , Inc. is **DISMISSED WITH PREJUDICE** . Plaintiff's Complaint against defendant United News & Media plc is **DISMISSED WITHOUT PREJUDICE .**

SO ORDERED , this 21stday of April , 1998 .

/ s / B.Avant Edenfield , Judge
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

William D.Kline , June 15 , 1998

Plaintiff,

v.

Dow Jones and Company , Barrons , The Wall Street Journal ,Dow Jones News Service , Manuel P.Asensio , Asensio and Company Inc. and PRnewswire ,Inc. **CV 698-003**

Defendants

*

ORDER

I. BACKGROUND

Pro se Plaintiff William D. Kline filed siut against several publishers of financial and business news alleging violations of the Georgia Securities Act of 1973 ,the Georgia Fair Business Practices Act of 1975 ,and possibly federal securities laws . Complaint 11 2 ,10 .Plaintiff who owns shares in Solv-Ex Corporation (Solv-Ex) ,alleged that in 1997 the defendants manipulated the price of Solv-Ex's stock by publishing false and misleading information about the company .Id. 11 3-5 . In response the defendants filed respective F.R.Civ.P. 12(b)(6) motions to dismiss . Doc, # # 7 , 9 , 11 , 13.

The Court subsequently granted those motions and dismissed Kline's case with prejudice . Doc.# 22 at 7 . Plaintiff now moves under F.R.Civ.P. 59(e) for an order modifying the Court 's 4/21/98 judgment to a dismissal without prejudice , and for leave to amend his complaint . Doc. # 23 .

II. ANALYSIS

Although leave of the court to amend a party's pleadings " shall be freely given when justice so requires ", F.R.Civ.P. 15 (a) , the question is whether this privilege ceases once a judgment on the merits has been entered . " Most courts faced with this problem have held that once a judgment is entered the filing of an amendment cannot be allowed until the judgment has been set aside or vacated under Rule 59 or Rule 60 ." 6 *Wright Miller & Kane , Federal Practice and Procedure statute 1489 at 692-93 (2d ed. 1990);* See e.g., Dussouy v. Gulf Coast Inv. Corp. , 660 F.2d 594 , 597 n.1(5th Cir.1981).

The Eleventh Circuit has " adopt[ed] the rule that after a complaint is dismissed , the right to amend under Rule 15(a) terminates....," Czeremcha v. International Assoc. of Machinists & Aerospace Workers , AFL-CIO , 724 F.2d 1552 ,1556 (11th Cir. 1984) but " [t]he plaintiff may .... move for relief under Rules 59(e) or 60 (b) on the basis of proposed amendments even after the action is dismissed and final judgment is entered ." Id.(footnotes omitted).

Because the presumption of liberally granting motions to amend disappears after judgment has been entered , First Nat'l Bank v. Continental Illinois Nat'l Bank , 933 F.2d 466 , 468 (7th Cir.1991) ," the party making a Rule 59(e) motion so that it can amend it's complaint had better provide the district court with a good reason to grant it's motion ." Harris v. City of Auburn , 27 F 3d 1284 , 1287 (7th Cir. 1994).

To show a " good reason " under Rule 59(e) , the movant must establish either (1) an intervening change in controlling law ; (2) the availability of new evidence ; or the need to correct clear error or manifest injustice . Sussman v. Salem , Saxon & Nielson , P.A., 153 F.R.D. 689 ,694 (M.D.Fla. 1994) ; 12 *Moores Federal Practice statue* , 59.30[5] (3d. 1997) Amendment of a judgment under 59(e) is " extraordinary remedy to be employed sparingly in the intetrest of finality and conservation of scarce judicial resources ." Wendy's Int'l ., Inc . v. Nu-Cape Const ., Inc ., 169 F.R.D. 680 , 685 (M.D. Fla. 1996) ; *Moores Federal Practice*

Statute 59.30[4](mathew Bender 3d ed .).

Kline fails to meet this standard . He has filed no proposed amendment of his complaint , and " agrees ....that his [c]omplaint is deficient . " Doc . # 23 1 1 . He then request that his previously filed summary judgment motion (doc. # 17) serve " as an attachment to [the instant] motion[s] , " to " save time and space because the contents are needed for the [c] ourt to understand that the Plaintiff dose (sic) have a claim ." Doc. # 23 1 2 .

Plaintiff thus points to no evidence showing that the Court's judgment was in error . See Matter of Prince , 85 F. 3d 314 , 324 ,(7th Cir. 1996) (Rule 59 movant alleging error must point to record evidence that clearly establishes manifest error of law or fact). Cert. denied , Prince v. Unsecured Creditors Committee , 117 S.Ct.608 (1996) . He is at best rehashing his pre-judgment arguments , so his motion must be denied .See Wendy's 169 F.R.D.at 686 .

In further support of his Rule 59(e) motion , Kline states that he would now like to bring his securities fraud claims under Section 10(b) of the Securities Exckange Act of 1934 (15 U.S.C. statute 78j(b) and Rule 10(b) (17 C.F.R. statute 240.10b-5) . Doc.# 23 1 1. However , " [Rule 59(e)] motions cannot be used to raise new arguments which could and shoud have been raised before judgment was entered . " Havoco of America , Ltd v. Sumitomo Corp . of America , 971 F . 2d 1332 , 1336 (7th Cir. 1992) citing Weihaupt v. American Medical Ass'n , 874 F.2d 419 , 425 (7th Cir. 1989) ;See also Lussier v. Dugger , 904 F.2d 661 , 667 (11th Cir . 1990)

There was nothing preventing Kline from bringing his claims under the Securities Exchange Act in his initial Complaint . In fact ,plaintiff plainly states in his complaint that he chose to rely upon the Georgia Securities Code because " it is clearer and their fraud section is the same as the federal 10(b) and Rule 10(b) 5 , except it gives the individual standing to sue in no uncertain terms . The plaintiff can collect cost plus legal fees but not under the federal code ." Complaint ,Introduction 1 7 .

Kline therefore was aware of his option to pursue a case under federal law , but declined to do so for various reasons . A change in plaintiff's legal strategy is not a legitimate argument for a modification of the court's decision . See Havoco , 971 F.2d at 1336 ; see also Wendy's ,169 F.R.D. at 686 (" [A motion to alter or amend] cannot be considered a vehicle for raising issues or citing auyhorities the party could or should have presented prior to the court's ruling ".)

Even assuming that plaintiff could present a " good reason " for the court to modify it's judgment , granting him leave to amend would be futile . 1 To state a claim under section 10(b) , plaintiff must allege that (1) defendants misrepresented or omitted to state material facts in connection with the purchase or sale of a security ; (2) plaintiff relied to his detriment upon defendants misrepresenta- tion or omissions ; and (3) defendants made their misrepresentations or omissions with " scienter " ,that is , with an intent to deceive , manipulate , or defraud plaintiff . Crummere v. Smith Barney , Harris Upham & Co., Inc ; 624 F.Supp.751 , 754 (S.D.N.Y. 1985)

Kline does not allege that he relied to his detriment upon defendants ' misrepresentations or omissions in purchasing his stock . In fact ,he continued to purchase shares in sokv-ex despite the negative press that it was allegedly recieving from defendants .Complaint 1 8. Rather than being duped by price manipulation tactics , Kline was knowingly and voluntarily making risky investments . see e.g. id . " [" (in July , Solv-Ex was forced into Chapter 11 . The stock stopped trading . [Between October and November] the plaintiff purchased some more stock in the two companies , hoping that the defendants would leave them alone . Boy was he wrong .")

Furthermore , Kline's Complaint fails " to allege that the defendants did anything " in connection with " the sale or purchase of any security . Instead , he simply contends that the defendants published several articles that were untrue and /or contained half truths , material omissions of fact and

misleading information . " Doc. # 22 at 3 . As Kline has neglected to submit a proposed amended complaint supplementing his initial allegations , they remain insufficient to state a claim under section 10(b).

Moreover ,F.R.Civ.P. 9(b) provides that " in all averments of fraud or mistake , the circumstances constituting fraud or mistake shall be stated with particularity ." Id . ; Brooks v. Blue Cross and Blue Shield of Florida , Inc; 116 F.3d 1364 , 1370 (11th Cir.1997) " To satisfy Rule 9 (b) , plaintiff must allege facts stating the time , place , and nature of the misrepresentation or omissions for which each defendant is to be held responsible ." Savino V. E. F. Hutton & Co. ,507 F. Supp. 1225 , 1232 (S.D.N.Y.1981) ; see also Brooks ,116 F.3d at 1370 .

" [I]t is beyond peradventure that Rule 9(b) applies to complaints alleging violation of Section 10(b) and Rule 10b -5 ." Savino , 507 F. Supp . at 1231 n. 3 . Kline's original complaint failed to satisfy this pleading requirement , doc . # 22 at 4 , and the instant motion provides no supplemental facts to cure the defect .Once more , modifying the Court's judgment to allow plaintiff " a second bite of the apple " would be futile .

" [e] ven in the case of *pro se* litigants .... [the courts do not have] license to serve as *de facto* counsel for a party , [cit.] , or to rewrite an otherwise deficient pleading in order to sustain an action ....." GJR Investments , Inc. v. County of Escambia , Fla . , 132 F.3d 1359 , 1369 (11th Cir. 1998) . Plaintiff's initial Complaint was riddled with technical and theoretical deficiencies that rendered it insufficient to state to state a cognizable claim . Having been presented with no " good reason " to depart from that holding , this Court must deny plaintiff's motions to modify the judgment and amend the Complaion .

III. CONCLUSION

Plaintiff William D.Kline 's Rule 59(e) motion (doc . # 23-2) is **DENIED** . In addition , " [u]nless

postjudgment relief is granted , the district court lacks power to grant a motion to amend the complaint under Rule 15(a) ," Acevedo- Villalobos v. Hernandez , 22 F.3d 384 , 389 (1st cir . 1994) ; see Public Citizen v.Liggett Group , Inc. , 858 F.2d 775 , 781 (1st Cir . 1988) . Consequently , the motion to amend plaintiff's Complaint (doc . # 23-1) is **DENIED** as moot.

SO ORDERED , this ____ day of June , 1998

/ s / B.Avant Edenfield
UNITED STATES DISTRIC COURT
SOUTHERN DISTRICT OF GEORGIA

Zweig v. Hearst Corp., 594 F.2d 1261 (9th Cir. 04/09/1979)

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT No. 76-1647

RICHARD L. ZWEIG AND MURIEL BRUNO, APPELLANTS,

v.

THE HEARST CORPORATION, A CORPORATION, ALEX N. CAMPBELL, H. W. JAMIESON, E. L. OESTERLE, APPELLEES.

[11]

Plaintiffs appeal from a judgment denying recovery in their action for damages against a financial columnist who, they allege, purposely used his column to elevate the price of stock in a small company for his own benefit.

[12]

Richard Zweig and Muriel Bruno sued Alex Campbell, a financial columnist for the Los Angeles Herald-Examiner; the Hearst Corporation, Campbell's employer; and H. W. Jamieson and E. L. Oesterle, directors of American Systems, Inc. (ASI). Zweig and Bruno alleged violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and of Rule 10b-5, 17 C.F.R. 240.10b-5, as well as common-law fraud and negligence.

[13]

Campbell wrote and the Herald-Examiner published a column that contained a highly favorable description of ASI. The plaintiffs alleged that the directors of ASI had made material misrepresentations and omissions in an interview with Campbell and hoped that he would publish false information "puffing" ASI shares. This is essentially what he did, but only after first buying 5,000 shares from the company at a substantial discount below their market price.

[14]

Zweig and Bruno claimed that Campbell's column

about ASI caused the price of ASI stock to rise, and that they were damaged when they merged their company with ASI in exchange for a quantity of temporarily inflated ASI stock. The plaintiffs were under a contractual duty to exchange stock at the market price as of a time certain. They alleged that Campbell had violated Rule 10b-5 by publishing his column about ASI without disclosing to his readers that he had bought ASI stock at a discount and intended to sell some of it upon the rise in market price that he knew his column would cause. In addition, plaintiffs contended, Campbell should have revealed to his readers that the column was likely to be republished as an advertisement for ASI in an investment periodical in which Campbell held a substantial ownership interest.

[15]

The case against the Hearst Corporation was dismissed by a summary judgment, on the ground that Hearst was not vicariously liable for Campbell's actions. Another panel of this court affirmed. Zweig v. Hearst Corp., 521 F.2d 1129 (9th Cir.), Cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 399 (1975).

[16]

The case against Campbell, Jamieson, and Oesterle went to trial without a jury in April of 1975. During the plaintiffs' opening statement and again after the testimony of the plaintiffs' first witness, the trial judge indicated that he did not agree with the plaintiffs' theory of liability under Rule 10b-5 as it applied to Campbell. Realizing that a full trial on the merits might be useless, the plaintiffs made an offer of proof and asked the court to rule on Campbell's motion to dismiss in light of this offer of proof.

[17]

After considering the plaintiffs' offer of proof, the trial judge granted the motion to dismiss. The judge then issued "Findings of Fact and Conclusions of Law", and entered judgment for Campbell. Zweig v. Hearst Corp., 407 F. Supp. 763 (C.D.Cal.1976). The action against Jamieson and Oesterle has been settled; the only parties to this appeal are

Zweig and Bruno (appellants) and Campbell (appellee).
[18]

We reverse.
[19]

I. The Standard of Appellate Review
[20]

In their discussions with the trial court, the parties referred to Campbell's motion as a motion to dismiss pursuant to Fed.R.Civ.P. 41(b). Rule 41(b) provides:
[21]

" * * * After the plaintiff, in an action tried by the court without a jury, Has completed the presentation of his evidence, the defendant * * * may move for a dismissal on the ground that Upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff * * *. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a) (findings of fact and conclusions of law).
[22]

The transcript reveals that the parties intended the motion to dismiss to test the legal sufficiency of the plaintiffs' claim. The record shows that, notwithstanding the provisions of Rule 41(b), the parties did not expect the trial judge to "try" the facts, but to assume the facts described in the offer of proof.In effect, the motion functioned as a motion for summary judgment pursuant to Fed.R.Civ.P. 56.
[23]

When a trial court grants a motion to dismiss after the plaintiff presents his evidence, an appellate court will not set aside the trial court's findings of fact unless they are clearly erroneous. Rutledge v. Electric Hose and Rubber Co., 511 F.2d 668, 676 (9th Cir. 1975). However, in reviewing a ruling on a motion for summary judgment the appellate court must decide whether, viewing the facts in the light most favorable to the parties opposing the motion, the moving party is entitled to prevail as a matter of law. Handi Investment Co. v. Mobil Oil Corp.,550 F.2d 543, 546 (9th

Cir. 1977). We follow the summary judgment standard of review here.
[24]

II. Materiality of Omitted Facts
[25]

Campbell wrote four or five columns a week during 1969 as a financial columnist for the Herald-Examiner. In these columns he frequently discussed the financial conditions of small companies in southern California. He often bought the shares of companies that he expected to discuss favorably in forthcoming columns, and then sold the shares at a profit soon after his columns appeared.
[26]

In late May or early June of 1969, Campbell interviewed Jamieson, Oesterle, and another ASI officer to obtain information for a column about ASI. The ASI officials did not give Campbell complete or accurate information. They were silent about problems then confronting ASI. **There is no claim that Campbell was a knowing party to any fraud by ASI, but Campbell engaged in no independent research before publishing his story.** Campbell also purchased directly from ASI 5,000 shares of its stock. While the bid price of the ASI stock on the day of the purchase was 3 5/8, Campbell paid only $2.00 per share.
[27]

Two days after he bought the ASI shares, Campbell's column about ASI appeared in the Herald-Examiner. The article contained several erroneous statements that cast the company in a more favorable light than it deserved. On this record we assume that Campbell did not know that the misleading parts of his column were false. An inference is permissible that, while he made no effort to portray the facts accurately, he honestly believed the optimistic opinions of his codefendants, who were then (perhaps unknown to Campbell) preparing to close the executory plan of merger with plaintiffs' firm, Reading Guidance Center, Inc. (RGC).
[28]

Equally reasonable is the inference that Campbell knew

that his column would run up the prices of ASI stock for a short time, during which persons who knew the reason for the increase could unload the stock at a profit. Thus, the trial judge's finding that Campbell had no plan to create the price rise and then sell was premature under the summary-judgment standard of review. Moreover, unless Campbell can produce more evidence than that already in the record to rebut the strong inference caused by his long history of similar dealings, any "finding" that he did not intend to profit from his stock purchase and concurrent column would be of dubious value under the clearly erroneous standard. We therefore presume an intent to profit, the inference urged by plaintiffs, at this stage of the
case.

[29]

After Campbell's column appeared, the price of ASI stock rose swiftly. The plaintiffs' offer of proof included the opinion of an expert witness that the Campbell column caused a market increase in the number of investors wanting to buy ASI stock, and that this, combined with the "thin float" of the stock (500,000 shares outstanding), led to the dramatic increase in the bid price of the shares.

[30]

On June 5, the day after the article appeared, Campbell sold 2,000 of his 5,000 ASI shares for $5.00 per share, thereby recouping his entire cash investment while retaining 3,000 shares of the stock for future profits.

[31]

Plaintiffs Zweig and Bruno did not know of any plan to inflate the price of the stock. Each owned one third of the shares of RGC. In February of 1969, RGC entered into a plan of reorganization by which RGC was to merge into ASI. ASI was to pay the RGC stockholders by transferring enough ASI stock to equal a market value of $1,800,000. The number of shares would be determined by the average closing bid for ASI stock for the five market days preceding the closing date, June 10, 1969.

[32]

The plaintiffs were prepared to show that an artificial price rise was caused by the Campbell column and led to a substantial dilution in the interest in ASI that they ultimately received under the merger agreement.
[33]

Zweig and Bruno argue that Campbell should be liable under Rule 10b-5 for his omission of these material facts from his column about ASI: (1) that he had invested in ASI stock at a discount price two days before his column was to be published, and intended to sell it on the short-swing rise in price; (2) that he made a practice of "scalping" the stocks of companies about which he wrote by buying their stock shortly before his columns about them were published and then selling the stock at a profit after the columns caused a jump in the market price; and(3) that his favorable columns were often reprinted as advertisements for the subject companies in a financial journal in which Campbell had an interest.
[34]

Zweig and Bruno contend that Rule 10b-5 required Campbell to inform his readers of these facts so that the readers could judge for themselves whether Campbell's personal motives for promoting ASI affected his objectivity.
[35]

Rule 10b-5 provides :
[36]

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate

commerce, or of the mails or of any facility of any national securities exchange,
[37]

(a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

[40]

in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5 (1978).

[41]

The appropriate test for the materiality of an omitted fact is whether there is a substantial likelihood that a reasonable investor would consider the fact important in making his or her investment decision. TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976)*fn8; Lewelling v. First California Co., 564 F.2d 1277 (9th Cir. 1977). **The facts revealing Campbell's lack of objectivity were material under this test**. Reasonable investors who read the column would have considered the motivations of a financial columnist such as Campbell important in deciding whether to invest in the companies touted. See Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 153, 92 S. Ct. 1456, 31 L. Ed. 2d 741 (1972); Chasins v. Smith, Barney & Co., 438 F.2d 1167, 1172 (2d Cir. 1970).

[42]

Had Campbell's story objectively reported an undisputed fact or news event, such as the discovery of a valuable mineral deposit or the declaration of a dividend, his ownership of ASI stock might not have been significant in reasonable investors' minds. But given the column's style and tone, with its glowing praise of ASI and conclusion that the firm was a worthy investment despite its risks, the effect of Campbell's stock ownership on his objectivity would be important to his readers. We conclude, therefore, that the omitted facts alleged as violations were material. Unless some doctrine limits Campbell's duty to disclose the facts, he must be held liable for intentionally withholding them. **Rule 10b-5 makes no distinction between material misrepresentations and nondisclosure of material facts necessary to keep other statements from being misleading.**

[43]

III. The Duty to Disclose

[44]

Most disclosure cases cited by the parties have involved a corporate insider, or a receiver of a tip, who traded in the corporation's stock without disclosing material facts that, if publicly known, would have affected the stock's market value. See, e. g., Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228 (2d Cir. 1974); S. E. C. v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968) (en banc), Cert. denied, 394 U.S. 976, 89 S. Ct. 1454, 22 L. Ed. 2d 756 (1969). In most of these cases, the information withheld was directly relevant to inherent value of the firm's assets and operations, or its potential earnings and growth prospects.

[45]

In this case, the information withheld from the public was of a slightly different type. Viewing the evidence in the light most favorable to the plaintiffs, Campbell failed to reveal to investor-readers that he expected to gain personally if they followed his advice. He did not tell them that he had purchased the stock at a bargain price knowing that he would write his column and then sell on the rise, as he had done with other stocks before. He did not reveal that his column would also appear as a paid advertisement for ASI in his journal. **This withheld information did not relate directly to the company's value and expected performance, but it was necessary to avoid misleading Campbell's audience on the reliance they could place on the column. We hold that in failing to disclose these facts, Campbell violated Section 10(b) and Rule 10b-5 just as corporate insiders do when they withhold material facts about a corporation's prospects while trading its stock.**

[46]

Zweig and Bruno rely on S. E. C. v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 84 S. Ct. 275, 11 L.Ed. 2d 237 (1963). In Capital Gains, the Supreme Court held that the SEC could obtain an injunction under the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 Et seq., to force a registered advisory service to disclose its practice of profiting from the market effect of its investment recommendations,

which it made in a monthly report to subscribers. The Court found the service's failure to disclose this practice a "fraud or deceit" on its clients within the meaning of the Investment Advisers Act of 1940.
[47]

The holding in Capital Gains was limited to the duties imposed on investment advisers by the 1940 Act. The plaintiffs here do not argue that Campbell was an investment adviser as defined in that statute; thus, Capital Gains is not controlling.But the failure to bring the case within the Investment Advisers Act does not mean that the claim under Section 10(b) and Rule 10b-5 should fail. We hold that as applied to the facts we must assume in this case, the Investment Advisers Act was not meant to limit the Securities Exchange Act or Rule 10b-5. Instead, we believe that these provisions complement each other and provide different means to curb slightly different types of "fraud or deceit".
[48]

A number of cases since Capital Gains suggest that Rule 10b-5 requires the disclosure of conflicts of interest in situations similar to the facts of this case. In Chasins v. Smith, Barney & Co., supra, the court held that a brokerage firm had the duty to disclose its "market making" activities in certain stocks to a client who purchased those stocks on the firm's recommendation. The court upheld a judgment for damages suffered by the client, on the ground that the firm's failure to inform the customer of the possible conflict of interest was an omission of a material fact in violation of Rule 10b-5.
[49]

The court's holding in Chasins could be interpreted narrowly, as imposing a duty to disclose conflicts of interest only upon brokers acting within a traditional broker-client relationship. However, the Supreme Court's opinion in Affiliated Ute Citizens of Utah v. United States, supra, illustrated that this duty may be imposed on others as well.
[50]

The plaintiffs in Affiliated Ute Citizens were former shareholders in the Ute Distribution Corporation (UDC), a

corporation formed as part of a plan to distribute the assets of the Ute Indian Tribe among its mixed-blood and full-blood members. Upon its formation, UDC had issued 10 shares of stock in the name of each mixed-blood member and then appointed a Utah bank to act as the UDC stock transfer agent. The plaintiffs sued the bank and two of its employees under Rule 10b-5 when they learned that the bank employees had promoted and participated in sales of Indians' shares to non-Indian buyers at a price that the employees knew was well below the market value of the securities.

[51]

We find Campbell's activities sufficiently similar to those of the bank employees in Affiliated Ute Citizens to impose on him a duty to disclose to his readers his stock ownership, his intent to sell when the market price rose, and the practice of reprinting his articles. Columnists, like transfer agents, ordinarily have no duty to disclose facts about their personal financial affairs or about the corporations on which they report. But there are instances in which Section 10(b) and Rule 10b-5 require disclosure. Here, as in Affiliated Ute Citizens, the defendant assumed those duties when, with knowledge of the stock's market and an intent to gain personally, he encouraged purchases of the securities in the market. Campbell should have told his readers of his stock ownership, of his intent to sell shares that he had bought at a discount for a quick profit, and of the practice of having his columns reprinted verbatim as advertisements in the financial journal in which he had an interest.

[52]

Our decision conforms to the "flexible duty" standard enunciated by this court in White v. Abrams, 495 F.2d 724 (9th Cir. 1974). There, this court held that the following factors are relevant in determining the scope of the duty to disclose material facts under **Rule 10b-5: (1) the relationship of defendant to plaintiff; (2) defendant's access to the information as compared to that of plaintiff; (3) defendant's benefit derived from the relationship; (4) defendant's awareness of whether plaintiff was relying on**

their relationship in making his or her investment decisions; and (5) defendant's activity in initiating the transaction in question. 495 F.2d at 735-36.

[53]

While seemingly addressed to the usual "insider" situation, in which the undisclosed information concerns the inherent value of the firm, the factors in the White v. Abrams test are also applicable to Campbell's nondisclosure to his readers of his financial interest in the ASI market. His relationship to the public was not a fiduciary one under common law, but that is not dispositive of the Rule 10b-5 claim. Compare Santa Fe Industries v. Green, 430 U.S. 462, 97 S. Ct. 1292, 51 L. Ed. 2d 480 (1977) (no rule 10b-5 violation despite alleged violation of state law fiduciary duties), With Affiliated Ute Citizens of Utah v. United States, supra (no ordinary state law duties, but Rule 10b-5 duty violated). Campbell was an informal financial adviser in a medium that the plaintiffs offer to prove influenced the market for ASI stock. He controlled the information that he owned the stock and intended to sell, and he kept those facts secret. As a salaried columnist for a large newspaper, he benefited from his relationship with his readers, on whom his employment ultimately depended. Zweig and Bruno have offered to prove that his column initiated many of the stock transactions that caused the quick rise in the stock's price. Hence, under the
White v. Abrams approach, Campbell's duty to his readers is well established.

[54]

In order for Campbell to be liable to nonreaders Zweig and Bruno, however, a further duty must be shown. To recover damages, these plaintiffs must prove that Campbell owed them a duty. They must show that they were in a relationship with Campbell similar to his readers' relationship with him. We believe that RGC, and its shareholders Zweig and Bruno, were in a position similar to that of Campbell's readers. RGC and the readers had strikingly similar stakes in the processes of the market.

[55]

At the time the Campbell column was published, RGC had already contractually committed itself to sell its assets to ASI. ASI agreed to pay at a future date stock worth $1,800,000 for the RGC assets. The number of ASI shares was to be fixed by the market value of ASI stock on given dates. In making this deal, RGC relied on the existence of an honest market. A market presumes the ability of investors to assess all the relevant data on a stock, including the credibility of those who recommend it, in creating a demand for that stock.

[56]

In effect, RGC in good faith placed its fate in the hands of market investors, including Campbell's readers. RGC relied on the forces of a fully informed market. Instead, it was forced to sell in a manipulated market. If Campbell was unaware of RGC's reliance on the market, he could have discovered it with minimal effort by asking ASI or RGC about the terms of the merger, or by checking the reorganization agreement that had been signed several months before. RGC was a foreseeable plaintiff.

[57]

Furthermore, the more readers the Campbell column influenced, the greater the distortion of the market. As the price of ASI stock rose, the added losses caused by the deception did not fall upon the readers, but shifted to RGC. Each reader who bought into ASI at the inflated price reduced the number of shares that ASI would have to issue to RGC in the merger. The more shares the readers bought in reliance on Campbell, the less real value the ASI shareholders as a whole had to give up in the merger, and the more RGC had to absorb the adverse effects of the deception. In this unusual situation, the duty Campbell owed his readers must also extend to RGC.

[58]

To illustrate the point, one can assume (as we must on summary judgment) that the plaintiffs can prove that the average market price of ASI stock would have been $3.25 per

share without Campbell's column, or with a column that fully disclosed all material facts. This means that the 500,000 outstanding shares of ASI stock would have been worth about $1,625,000 in the marketplace. It follows that about $1,625,000 is what a free market would have considered the ASI operation to be worth.*fn14 Meanwhile, both parties to the merger agreed in arm's length dealings that RGC was worth $1,800,000; thus, the combined ASI-RGC operation would be worth, in an unmanipulated market, about $3,425,000.

[59]

Zweig and Bruno have charged (and we must assume) that as a result of Campbell's manipulation of the market, the price of ASI stock rose to an average of $4.35 per share on the crucial dates prior to the closing of the merger. This meant that instead of receiving more than 540,000 newly issued shares of ASI, RGC received only 413,793. Instead of owning roughly 52 per cent of the combined enterprise, RGC became merely a minority shareholder in ASI. It follows that the ASI shareholders, including Campbell and his readers who bought, came to own nearly 55 per cent of the combined enterprise (by having 500,000 of 913,793 shares) instead of the 48 per cent they would have owned if the market had been free from Campbell's manipulation. The ASI shareholders would have kept their 500,000 shares even in a true market, but they would have had to issue more than 540,000 new shares to RGC.

[60]

Thus, Campbell's readers, who paid an average of $4.35 per share, received, as well as paid, more than what the fair market value of the ASI stock would have been if there had been no manipulation. Because of the fortuitous circumstances of the terms of the ASI-RGC merger, the purchasers in the market received shares of an inflated participation by ASI in the combined enterprise. ASI's participation in the merged companies turned out to be about 55 per cent of the shares, and thus 55 per cent of the $3,425,000 in assets, or about $1,870,000. By this reckoning,

the pre-existing 500,000 shares of ASI turned out to be worth about $3.75 each in true asset value.The difference between $3.75 and the $3.25 that a fair market would have paid for each share was, in effect, paid by RGC. Campbell's readers would not have a claim against Campbell for this portion of the price inflation, because they did not bear the full brunt of the deception practiced on them. Part of the loss was borne instead by RGC, a fortuitous innocent bystander that had entrusted its assets to the market in the underlying merger plan

[61]

If more readers had relied on Campbell, RGC would have absorbed even more losses caused by the deception. Had the market risen to $4.65 per share for ASI, ASI's participation in the $3,425,000 enterprise would have been more than 56 per cent. The readers would have paid $1.40 more than each share was truly worth, but RGC would have picked up 61 cents per share of the loss by getting an even smaller participation in the combined companies.

[62]

We are aware that in traditional common-law terms it is difficult to make out a duty owed by Campbell to a corporation that did not, and could not, have read his writings before deciding to purchase ASI stock. But if there had been no RGC merger planned, Campbell would be liable to his readers for losses caused by the $1.10 per share temporary inflation that we must assume was caused by his column. In the unusual fact setting here, someone else, a purchaser of ASI stock that relied on the free and unmanipulated market that the federal securities laws were designed to foster, absorbed part of that loss. That forced purchaser should not be required, in effect, to pay Campbell's damages for him. We believe it fully consistent with the spirit and letter of the securities laws to impose upon Campbell a duty to RGC. As we have illustrated, to extend the obligation of disclosure to the readers but to bar RGC from recovery under the rubrics of reliance or duty would lead to a wholly incongruous result: the more effective Campbell was in elevating the price of the

stock for his own benefit, the greater the losses an innocent third party (RGC) would have to absorb.

IV. Conclusion :

[64] The other aspects of this cause of action require but brief comment. The Supreme Court has held that Rule 10b-5 will not support a private action for damages in the absence of an allegation of scienter. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976). Here, Campbell knew the material facts he failed to reveal. Moreover, there is at the very least a triable issue of fact as to whether Campbell intended to benefit from the column, from which he intentionally omitted any mention of his financial interests. **And as the Supreme Court noted in Affiliated Ute Citizens, supra, when a Rule 10b-5 action is based on nondisclosure, causation of harm is sufficiently proved by a showing of materiality. 406 U.S. at 128, 92 S. Ct. 1456, 31 L. Ed.** 2d 741; See Blackie v. Barrack, 524 F.2d 891, 906-07 (9th Cir. 1975), Cert. denied, 429 U.S. 816, 97 S. Ct. 57, 50 L. Ed. 2d 75 (1976); Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d at 238-41. **Thus, we believe the court below should presume on remand that the public purchases of ASI stock that followed the republication of the article were in reliance on it. RGC did not rely specifically on Campbell or his column, but it did rely on the natural process of the market. That market included Campbell's readers, who must be presumed to have relied on his making a full and frank disclosure. We hold that these two legitimate expectations constitute sufficient reliance to establish liability in this case.**

[65]

While Rule 10b-5 should not be extended to require every financial columnist or reporter to disclose his or her portfolio to all of his or her readers, it does cover the activities of one who uses a column as part of a scheme to manipulate the market and deceive the investing public. On the record in this case there were material questions of motive and method that should be resolved in a trial.

[66]

The court below asserted that it saw no harm or impropriety in a columnist's "making a nickel" at the same time he tells his readers of what may truly appear to him to be an enterprise with a bright future. The trial court was apprehensive that compelling disclosure of financial interest in such a situation would provide a disincentive to columnists to report on the merits of worthy companies. This observation is true, but it proves too much. If brokers were permitted to make secret profits by self-dealing in the market, they too would be stimulated to find better stocks, in which they could invest personally while passing along the advice to their customers. Moreover, the judgment of corporate directors and officers and controlling shareholders might similarly be spurred if they could expect short-swing profits in the markets for the stocks of the companies they manage. But the federal securities laws, in guarding the public from abuses, strictly circumscribe the opportunities of persons holding certain positions to profit from their positions. We hold that these laws also require a financial columnist, in recommending a security that he or she owns, to provide the public with all material information he or she has on that security, including his or her ownership, and any intent he or she may have (a) to score a quick profit on the recommendation, or (b) to allow or encourage the recommendation to be published as an advertisement in his or her own periodical.

[67]

Reversed and remanded.

[68]

ELY, Circuit Judge (Dissenting):

[69]

I respectfully dissent. I agree that causation and reliance may, in certain circumstances, be inferred from materiality. Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 153-54, 92 S. Ct. 1456, 31 L. Ed. 2d 741 (1972). But it is also clear that "affirmative evidence of non-

reliance may defeat this inference." Crocker-Citizens National Bank v. Control Metals Corp:, 566 F.2d 631, 636 n. 3 (9th Cir. 1977). The record plainly shows that the appellants' decision to acquire ASI stock, embodied in the merger agreement between ASI and RGC, predated the publication of Campbell's column by several months. Thus, it is, as I see it, Impossible that a causal relationship could exist between Campbell's wrongful conduct and the appellants' decision to invest. There was not even the possibility of reliance upon Campbell's column in connection with the execution of the merger agreement by the appellants. In these circumstances, we surely have compelling "affirmative evidence of nonreliance", evidence that should thoroughly negate any inference of causation and reliance.

[70]

While I agree that Campbell's alleged conduct was reprehensible, the District Court rightly concluded that he was not liable to the appellants in this case. The majority effectively removes the substantive content in the requirement of "in connection with" when it holds that Campbell may be liable in damages under Rule 10b-5 to individuals who decided to acquire stock and executed a merger agreement months before the wrongful conduct occurred. Cf. Raschio v. Sinclair, 486 F.2d 1029, 1030 (9th Cir. 1973) (purchase of stock approximately two months before alleged Rule 10b-5 violation). Sincerely believing that my Brothers stretch section 10(b) and Rule 10b-5 beyond their breaking point, I would affirm.

Opinion Footnotes

[72]

*fn1 Originally the plaintiffs also claimed that Campbell was negligent in repeating the directors' misrepresentations in his column without investigating the accuracy of those statements. The plaintiffs do not raise on appeal the issue of whether this alleged negligence constituted a violation of Rule 10b-5.

[73]

*fn2 The offer of proof contained self-serving testimony by Campbell, as well as evidence which tended to disprove that testimony. The preface to the "Findings of Fact and Conclusions of Law" stated that the trial judge had considered the evidence "in a light most favorable to the plaintiffs." 407 F. Supp. at 764. **This preface, like the rest of the facts and conclusions, was drafted by Campbell's attorneys and adopted by the trial court, a disapproved practice that severely hampers our review. See** Photo Electronics Corp. v. England, 581 F.2d 772, 776-77 (9th Cir. 1978). As a result, even if we did not treat the findings and conclusions as a ruling on a motion for summary judgment, we would nonetheless scrutinize them more carefully than we would had the court itself originally drafted them. Photo Electronics Corp. v. England, supra, citing Ceco Corp. v. Bliss & Laughlin Industries, Inc., 557 F.2d 687, 689 (9th Cir. 1977), And Burgess & Associates, Inc. v. Klingensmith, 487 F.2d 321, 324-25 (9th Cir. 1973).
[74]

*fn3 The findings of fact made by the court, to the extent that they constitute findings contrary to inferences that could have been drawn in favor of the plaintiffs, were inappropriate. Neely v. St. Paul Fire and Marine Insurance Co., 584 F.2d 341 (9th Cir. 1978). For example, the trial judge "found" that Campbell "had no plan to cause the (ASI) stock to rise and then immediately sell the same." Findings of Fact No. 20, 407 F. Supp. at 765. Because there was ample evidence to the contrary in the plaintiffs' offer of proof, this finding was improper.
[75]

*fn4 During the two-year period prior to June 4, 1969, Campbell bought the stock of 21 companies shortly before his columns about those companies were to be published. In almost every case he sold at least some of his recently purchased stock within five days after the publication of the column about the company involved. In 21 of 22 sale occurring within five days of the publication of a column, Campbell made a profit because of an increase in the price of

the stock after the publication of his column.
[76]

*fn5 The plaintiffs have not presented the question whether Campbell's acceptance of the stock at a bargain price was the receipt of "consideration" for his column, within the meaning of Section 17(b) of the Securities Act of 1933, which provides:

"It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof." 15 U.S.C. § 77q(b).
[77]

*fn6 According to this expert witness, the price of ASI stock would not have risen above $3.25 before June 10, 1969, without the Campbell column. But instead, the average closing bid price between June 3 and June 9 was $4.35 per share.
[78]

*fn7 In 1969, Campbell had a financial interest in the California Financial Journal,a weekly publication specializing in news about business ventures in Los Angeles County. It was a regular practice of Journal employees to call companies Campbell had written about and solicit those companies to run copies of the Campbell columns as advertisements in the Journal. On July 1, 1969, the Campbell column on ASI ran as an advertisement in the California Financial Journal.
[79]

*fn8 Although the TSC Industries case involved the materiality of information in proxy statements under Rule 14a-9, the Court's discussion suggests that the test for materiality would also apply in Rule 10b-5 cases. See 426

U.S. at 447 n.9, 96 S. Ct. at 2131 n.9.
[80]

*fn9 See United States v. Chiarella, 588 F.2d 1358 (2d Cir. 1978) (criminal liablity under Rule 10b-5 imposed on "markup man" in composing room of financial printing company who used knowledge of impending tender offers); Lewelling v. First California Co., supra (duty by brokerage firm to reveal to client that securities he was purchasing were being sold by firm's principal owner after passage through affiliated brokerage houses). Commentators have devoted much discussion recently to the question of whether Rule 10b-5 imposes a duty of affirmative disclosure on "quasi-insiders". See, e. g., ALI Fed. Securities Code § 1603, Revised Comment 3(d) (March 1978 Draft). "Quasi-insiders" are people who obtain nonpublic information from a source outside a corporation about events or circumstances which will affect the market in the corporation's stock. An example of a "quasi-insider" would be a Federal Reserve Bank employee who trades with knowledge of an upcoming change in margin rate. A financial columnist who trades with knowledge that a favorable article about a particular company is soon to be published is in the position of a "quasi-insider". Commentators have analyzed the case now before us, in its earlier stages, as posing the issue of Campbell's duty to disclose the forthcoming publications of his article about ASI before trading in ASI stock. See Fleischer, Mundheim & Murphy, An Initial Inquiry into the Responsibility to Disclose Market Information, 121 U.Penn.L.Rev. 798, 828-35 (1973); See also Peskind, Regulation of the Financial Press: A New Dimension to Section 10(b) and Rule 10b-5, 14 St. Louis U.L.Rev. 80, 92-96 (1969).
[81]

*fn10 The Investment Advisers Act of 1940 provides: " "Investment adviser' means any person who, for compensation, engages in the business of advising others, either directly (or indirectly) or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for

compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include * * * (D) the publisher of any bona fide newspaper,news magazine or business or financial publication of general and regular circulation * * *." 15 U.S.C. § 80b-2(a)(11). Because the issue is not properly before us, we need not decide whether a financial columnist for a newspaper of general circulation can ever be considered an investment adviser for the purposes of the Investment Advisers Act of 1940. See S. E. C. v. Wall Street Transcript Corp., 422 F.2d 1371, 1377 n.10 (2d Cir.), Cert. denied, 398 U.S. 958, 90 S. Ct. 2170, 26 L. Ed. 2d 542 (1970); Loomis, The Securities Exchange Act of 1934 and the Investment Advisers Act of 1940 Release No. 1A-563 (Jan. 14, 1977), 42 Fed.Reg. 2953. And for the same reason, we need not await the Supreme Court's decision on whether a private right of action should be implied from the Investment Advisers Act. Lewis v. Transamerica Corp., 575 F.2d 237 (9th Cir.), Cert. granted, 439 U.S. 952, 99 S. Ct. 348, 58 L. Ed. 2d 343 (1978).
[82]

*fn11 For a prescient discussion of this issue, See Peskind, supra n.9, at 86-88.
[83]

*fn12 If liability is established at trial, the damages would be measured by the difference between the value paid to RGC on the merger and the value that would have been paid if Campbell had revealed these material facts in his column.
[84]

*fn13 Although White v. Abrams has been overruled insofar as it contemplated liability without scienter (Ernst & Ernst v. Hochfelder, 425 U.S. 185, 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976)), its approach to the duty question is otherwise the law of this circuit. See Crocker-Citizens Nat'l Bank v. Control Metals Corp., 566 F.2d 631, 636 n.2 (9th Cir. 1977).
[85]

*fn14 For a note on the correlation between the value of a firm's securities and that of its assets, See V. Brudne and

M. Chirelstein, Corporate Finance, 77-81 (1972)
[86]

*fn15 At $3.25 per share, the number of shares issued to RGC would have been 553,846, or 52.6 per cent of the joint enterprise. The parties to the merger had agreed, however, that a minimum price for ASI stock would be $3.33 per share; thus, the maximum number of shares that could have been issued to RGC was 540,540, or 51.9 per cent of the combined companies.
[87]

*fn16 Our reasoning is consistent with that of the many cases in which receivers and givers of inside tips have been held liable for violations of Section 10(b) and Rule 10b-5. When a corporate insider gives a tip, even if he or she does not gain from the transaction that results, and even if the receiver of the tip has no fiduciary duty to the plaintiff, the congressional concern for the integrity of the marketplace compels liability. See, e. g., S. E. C. v.Texas Gulf Sulphur, supra. **Even outsiders to a corporation can be held criminally liable under the federal securities laws for improperly influencing the market for the corporation's shares.** See United States v. Charnay, 537 F.2d 341 (9th Cir.), Cert. denied, 429 U.S. 1000, 97 S. Ct. 527, 50 L. Ed. 2d 610 (1976). In Charnay, a criminal indictment charging outsiders with Rule 10b-5 violations was upheld despite an unusual factual setting that presented issues of first impression.

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SUPREME COURT OF THE UNITED STATES

No. 59 1961.SCT.147 , 365 US. 265, 81 S. Ct. 534, 5 L. Ed. 2d 551, February 20, 1961

COSTELLO
v.
UNITED STATES

[59]

We cannot say, moreover, that the delay denied the petitioner fundamental fairness. He suffered no prejudice from any inability to prove his defenses. Rather, the harm he may suffer lies in the harsh consequences which may attend his loss of citizenship. He has been a resident of the United States for over 65 years, since the age of four. We may assume that he has built a life in reliance upon that citizenship. But Congress has not enacted a time bar applicable to proceedings to revoke citizenship procured by fraud. On this record, the petitioner never had a right to his citizenship. Depriving him of his fraudulently acquired privilege, even after the lapse of many years, is not so unreasonable as to constitute a denial of due process. *Cf. Johannessen v. United States, 225 U.S. 227, 242-243.*

[60]

IV.

[61]

The petitioner moved for leave to amend his petition for a writ of certiorari to add a question whether the present proceeding was barred by the order of the District Court dismissing the earlier proceeding on remand, without specifying whether the dismissal was with or without prejudice. We deferred decision on the motion pending oral argument. The motion is granted and we proceed to determine the merits of the question.

[62]

It is the petitioner's contention that the order dismissing the earlier complaint must be construed to be with prejudice because it did not specify that it was without prejudice, and the ground of dismissal was not within one of the exceptions under Rule 41 (b) of the Federal Rules of Civil Procedure. That Rule provides:

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"For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. . . .

Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

[64]

We hold that a dismissal for failure to file the affidavit of good cause is a dismissal "for lack of jurisdiction," within the meaning of the exception under Rule 41 (b). In arguing contra, the petitioner relies on cases which hold that a judgment of denaturalization resulting from a proceeding in which the affidavit of good cause was not filed is not open to collateral attack on that ground. *Title v. United States, 263 F.2d 28; United States v. Failla, 164 F.Supp. 307.* We think that petitioner misconceives the scope of this exception from the dismissals under Rule 41 (b) which operate as adjudications on the merits unless the court specifies otherwise. It is too narrow a reading of the exception to relate the concept of jurisdiction embodied there to the fundamental jurisdictional defects which render a judgment void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter. We regard the exception as encompassing those dismissals which are based on a plaintiff's

failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim.Failure to file the affidavit of good cause in a denaturalization proceeding falls within this category. *United States v. Zucca, supra; Costello v. United States, 356 U.S. 256.*

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At common law dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim. In *Haldeman v. United States, 91 U.S. 584, 585-586,* which concerned a voluntary nonsuit, this Court said, "there must be at least one decision on a right between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit. . . . There must have been a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmatively." A similar view applied to many dismissals on the motion of a defendant. In *Hughes v. United States, 4 Wall. 232, 237,* it was said: "In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." *See also House v. Mullen, 22 Wall. 42, 46; Swift v. McPherson, 232 U.S. 51, 56; St. Romes v. Levee Steam Cotton Press Co., 127 U.S. 614, 619; Burgett v. United States, 80 F.2d 151; Gardner v. United States, 71 F.2d 63.*

[66]

We do not discern in Rule 41 (b) a purpose to change this common-law principle with respect to dismissals in which the merits could not be reached for failure of the plaintiff to satisfy a precondition. All of the dismissals enumerated in Rule 41 (b) which operate as adjudications on

the merits -- failure of the plaintiff to prosecute, or to comply with the Rules of Civil Procedure, or to comply with an order of the Court, or to present evidence showing a right to the relief on the facts and the law -- primarily involve situations in which the defendant must incur the inconvenience of preparing to meet the merits because there is no initial bar to the Court's reaching them. It is therefore logical that a dismissal on one of these grounds should, unless the Court otherwise specifies, bar a subsequent action. In defining the situations where dismissals "not provided for in this rule" also operate as adjudications on the merits, and are not to be deemed jurisdictional, it seems reasonable to confine them to those situations where the policy behind the enumerated grounds is equally applicable. Thus a sua sponte dismissal by the Court for failure of the plaintiff to comply with an order of the Court should be governed by the same policy.

Although a sua sponte dismissal is not an enumerated ground, here too the defendant has been put to the trouble of preparing his defense because there was no initial bar to the Court's reaching the merits. *See United States v. Procter & Gamble Co., 356 U.S. 677, 680, and footnote 4; American Nat. Bank & Trust Co. v. United States, 79 U. S. App. D.C. 62, 142 F.2d 571. *fn5*

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In contrast, the failure of the Government to file the affidavit of good cause in a denaturalization proceeding does not present a situation calling for the application of the policy making dismissals operative as adjudications on the merits. The defendant is not put to the necessity of preparing a defense because the failure of the Government to file the affidavit with the complaint requires the dismissal of the proceeding. Nothing in the term "jurisdiction" requires giving it the limited meaning that the petitioner would ascribe to it. Among the terms of art in the law, "jurisdiction" can hardly be said to have a fixed content. It has been applied to characterize other prerequisites of adjudication which will not be re-examined in subsequent proceedings and must be brought into controversy in the original action if a defendant

is to litigate them at all. *See, e. g., Des Moines Navigation & R. Co. v. Iowa Homestead Co., 123 U.S. 552 (diversity of citizenship); In re Sawyer, 124 U.S. 200, 220-221* (jurisdictional amount). *See generally Noble v. Union River Logging R. Co., 147 U.S. 165, 173-174.* Decisions in the lower courts applying the exception construe "jurisdiction" to encompass dismissals on grounds similar to that in the present case. See *Madden v. Perry, 264 F.2d 169; Myers v. Westland Oil Co., 96 F.Supp. 667,* reversed on other grounds, *181 F.2d 371.* We therefore hold that the Government was not barred from instituting the present proceeding.

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Affirmed.

Nilsen v. City of Moss Point, 674 F.2d 379 (5th Cir. 04/26/1982)

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Similarly, when the court in Nilsen II/III declined to exercise its discretion to permit the amendment of the complaint, fairness requires that Nilsen be given a opportunity to raise those claims in a second proceeding.

The most instructive case is Truvillion v. King's Daughters Hosp., 5 Cir. 1980, 614 F.2d 520. There, the EEOC had filed a suit on the basis of the plaintiff's charge but had failed to comply with the requirement that it make a good faith investigation or with the regulatory requirement that it give notice to the employer, and, as a result, the first suit was dismissed. The EEOC then issued a right-to-sue letter to the plaintiff, who filed her own suit. The defendant argued that the plaintiff was barred by the judgment in the first action, where she could have intervened. **We held that the unfulfilled requirements in the first action were jurisdictional in the res judicata sense, in that they were merely conditions to reaching the merits, and the plaintiff therefore was not barred.** Although Truvillion offers some support for Nilsen's contention that the timely filing requirements are conditions to reaching the merits and thus that failure to fulfill them will not bar a subsequent action, we hesitate to extend Truvillion to this case. In Truvillion, we reasoned that the EEOC was not barred by res judicata because it could give the necessary notice, undertake the required good faith investigation, and start over. Id. at 525. **Similarly, in Costello v. United States, 1961, 365 U.S. 265, 81 S. Ct. 534, 5 L. Ed. 2d 551, which established the rule that a judgment based on failure to meet some condition to reaching the merits does not preclude a later action,** the unfulfilled requirement that an affidavit of good cause be filed was one that could be fulfilled prior to the institution of a second action. See generally Dussuoy v. Gulf Coast Investment Corporation, 5 Cir. 1981, 660 F.2d 594,

600 n.3. We may disagree with the Nilsen II/III court on the question how much discretion a court has in denying leave to amend .The fact remains that here the system operated to allow the federal courts discretion under rule 15(a) to deny leave to amend. **When a system does not permit liberal amendment, it is inappropriate to give broad preclusive effect to the inadequacies of the original complaint.** See generally Restatement (Second) of Judgments § 61, comment a at 142 (Tent. Draft No. 5, 1978).